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Supreme Court of the United States

OCTOBER TERM, 1955

No. 529

MARIE DESYLVA, PETITIONER,

vs.

**MARIE BALLENTINE, AS GUARDIAN OF THE
ESTATE OF STEPHEN WILLIAM BALLENTINE**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED NOVEMBER 21, 1955

CERTIORARI GRANTED JANUARY 3, 1956

No. 13880

**United States
Court of Appeals**
for the Ninth Circuit

MARIE BALLENTINE, as Guardian of the Estate
of Stephen William Ballentine, Appellant,

vs.

MARIE DeSYLVA,

Appellee.

MARIE DeSYLVA,

Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate
of Stephen William Ballentine, Appellee.

Transcript of Record

Appeals from the United States District Court for the Southern
District of California, Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant and Cross-Appellee:

FINK, LEVINTHAL & KENT,

6253 Hollywood Boulevard,
Los Angeles 28, Calif.

For Appellee and Cross-Appellant:

PAT A. McCORMICK,

PATRICK D. HORGAN,

905 Van Nuys Bldg.,
210 West Seventh St.,
Los Angeles 14, Calif. [1*]

In the United State District Court for the Southern
District of California, Central Division

No. 14400-T

MARIE BALLENTINE, as Guardian of the ~~Es~~
tate of STEPHEN WILLIAM BALLENTINE,
Plaintiff,

vs.

MARIE DeSYLVA, Defendant.

COMPLAINT FOR DECLARATORY RELIEF
UNDER THE COPYRIGHT LAW

Marie Ballentine files this Complaint under the Federal Declaratory Judgments Act, Section 2201 of Title 28, United States Codes, against the defendant, Marie DeSylva, and avers:

I.

This action arises under the Copyright Laws of the United States, U.S.C. Title 17, as hereinafter more fully appears, and jurisdiction is founded upon U.S.C. Title 28, Section 1338 (a). An interpretation by this Court of Section 24 of Title 17, U.S.C., will be required for a determination of this action.

II.

This is an action for a declaratory judgment as authorized by Section 2201 of Title 28, U.S.C., and is brought because [2] there is an actual controversy now existing between the parties to the above

entitled action as to which plaintiff seeks the judgment of this Court.

III.

Marie Ballentine is the mother and duly appointed and qualified Guardian of the Estate of Stephen William Ballentine, a Minor. Said Stephen William Ballentine is the son of George G. DeSylva, deceased, who died July 11, 1950. Defendant, Marie DeSylva, is the widow of said decedent.

IV.

That during his lifetime, said decedent, either by himself or in collaboration with others, was the author and composer of many musical works; that a great many of said musical works were copyrighted during the last 28 years of said decedent's life and said decedent was part or sole owner of said copyrights; that plaintiff is ignorant of the exact number and titles of all of said works but a partial list is attached hereto, marked Exhibit "A" and by this reference is incorporated herein as if set forth in full. Plaintiff is informed and believes and therefore alleges that the names, dates of copyright and titles of all works in which said decedent held a proprietary or copyright interest; as well as the exact nature and extent of such proprietary or copyright interest, are well known to defendant.

V.

That since the death of said decedent, a number of said copyrights have been renewed in the name of defendant. That the titles of said works are un-

known to plaintiff but well-known to defendant. That in the future, the balance of said copyrights on musical works written within the last 28 years of decedent's life [3] will come up for renewal.

VI.

That an actual and bona fide dispute has arisen between plaintiff and defendant in connection with such musical works copyrighted during the last 28 years of decedent's life, as follows:

Plaintiff contends, in accordance with Title 17, Section 24, U.S.C., that upon the death of decedent, defendant and Stephen William Ballentine became equally entitled to the renewals and extensions thereafter made of said copyrights; that defendant became trustee for Stephen William Ballentine of any such renewals and extensions taken out in the name of defendant; that defendant should account to Stephen William Ballentine for all moneys and benefits obtained by defendant as a result of such renewals and extensions.

Plaintiff is informed and believes and therefore alleges that defendant contends that Stephen William Ballentine has no rights whatsoever in and to the musical compositions of George G. DeSylva, deceased, or in and to the renewals and extensions of copyrights on any of such works or in and to any of the moneys or benefits derived from said renewals and extensions of copyrights effected since the death of said decedent; that the defendant does not hold any renewals and extensions of copyrights, or any part thereof, in trust for Stephen

William Ballentine and does not have to account to Stephen William Ballentine for any moneys or benefits derived therefrom.

VII.

That demand has been made upon defendant by plaintiff for an accounting and payment of moneys and benefits derived as a result of the renewals and extensions of the aforesaid copyrights obtained by defendant since the death of decedent, but [4] said demand has been refused by defendant. That plaintiff is ignorant of the amount of moneys and other benefits derived by defendant as a result of said renewals and extensions and an accounting by defendant of said moneys and benefits is necessary to protect the rights of said minor.

Wherefore, plaintiff prays this Court for judgment as follows:

1. For a declaration of the respective rights and duties of the parties with respect to the subject matter of this action;

2. That it be declared that Stephen William Ballentine has equal rights with defendant in and to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest, and which renewals and extensions were or will be obtained after the death of said decedent; that, in addition, it be declared that defendant holds, as trustee for Stephen William Ballentine, one-half of any such renewals and extensions of such copyrights obtained by her;

3. That defendant be ordered and directed to

account to plaintiff, for the benefit of Stephen William Ballentine, for one-half of all moneys and benefits obtained as a result of said extensions and renewals obtained by defendant since the death of decedent, and, further, that defendant be ordered and directed to pay such sums and transfer such benefits to plaintiff for the benefit of Stephen William Ballentine;

4. That plaintiff recover from defendant plaintiff's costs incurred in this action; [5]

5. That defendant be ordered to pay reasonable attorney's fees to be allowed by this Court;

6. For such other and further relief as this Court may deem proper.

FINK, LEVINTHAL & KENT

/s/ By LEON E. KENT,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 8, 1952. [6]

[Title of District Court and Cause.]

MOTION TO DISMISS

To Plaintiff and Her Attorneys:

Please take notice that on the 20th day of October, 1952, at the hour of ten o'clock a.m., or as soon thereafter as defendant's counsel may be heard, defendant will move the above entitled Court in the Courtroom of the Honorable Ernest A. Tolin, Judge of said Court, in the United States Post

Office and Courthouse Building at Los Angeles, California, in accordance with the attached motions, (1) to dismiss the complaint; (2) to strike certain matters from the complaint; (4) for enlargement of time.

Dated this 22nd day of September, 1952.

PAT A. McCORMICK and
PATRICK D. HORGAN,

/s/ By PAT A. McCORMICK,
Attorneys for Defendant. [13]

Motion No. One (To Dismiss the Complaint)

Defendant moves to dismiss the complaint herein on the ground that the same fails to state a claim against said defendant upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

[Endorsed]: Filed Sept. 22, 1952. [14]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS.

* * * * *

In view of the absence of a specific case dealing directly with the problem here presented, perhaps the most authoritative viewpoint on the problem is that of the Legal Department of the Copyright

Office. This is set forth in a letter sent to counsel for plaintiff on September 5, 1952 by George D. Cary, Principal Legal Advisor to the Copyright Office. A similar letter was sent to counsel for defendant. The pertinent portions of that letter follow:

"It has always been the position of the Copyright Office, as expressed in our information circulars [32] and correspondence, that a deceased author's widow and children are to be regarded as a single class for renewal purposes, and that the widow takes no precedence over the children in asserting renewal claims. While the instructions appearing on page 2(a) of Form R may not make this clear, the fact that the widow and the children are treated as separate, in stating the language to be used for asserting renewal claims, should not be interpreted as an implication that the one is to be preferred over the other. Our Circular 15 treats them as a single renewal category.

"We express this position in daily practice by accepting the renewal claims of an author's widow, and those of his children, on the same application. It is perhaps significant, in this connection, to note that if we regard two claims as basically conflicting, we will register them, but not on the same application. Likewise, we raise no question concerning joint widow-children claims and register them without correspondence. This differs from cases where a claim is asserted contradicting one which has already been registered, since we make a practice of

requesting an explanation in such instances, before proceeding with entry of the inconsistent claim.

"This is not to say that we regard our position as the only possible one, or that we rule out the possibility that a court may adopt the opposite position. However, we do feel that, in the absence of any direct authority, our present position is more probably correct. Likewise, it accords with our rule of registering claims in doubtful cases [33] since, if we adopted the opposite conclusion, we would be forced to reject outright the entry of certain claims.

"There is no direct authority on this point, although the commentators seem to be in general agreement that the widow and children are to be regarded as a single class, and are to hold the benefits of the renewal as tenants in common. Concededly, the language of the statute is not without ambiguity, although perhaps the more persuasive construction would seem to treat the claimants as one group. On the other hand, at least one aspect of the legislative history of the provision appears to support our position. The present language of the Section was substituted for that used in an earlier draft of the statute, which read: '* * * that the copyright * * * may be further renewed and extended by his widow, or in her default or if no widow survive him, by his children.' The fact that this specific provision was dropped in favor of the present language could imply an intention to group the widow and children together."

Marie DeSylva

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Respectfully submitted,

FINK, LEVINTHAL & KENT

/s/ By LEON E. KENT

* * * * * [35]

Affidavit of Service by Mail attached. [36]

[Endorsed]: Filed October 16, 1952.

[Title of District Court and Cause.]

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS**

This matter have regularly come before me for hearing pursuant to a Notice of Motion to Dismiss, on the 20th day of October, 1952, and such hearing having been had and the matter submitted to the Court for decision.

It is hereby ordered, that defendant's motion to dismiss the above entitled action is denied, and defendant shall have twenty days within which to answer.

Dated, this 16th day of December, 1952.

/s/ ERNEST A. TOLIN,
Judge.

[Endorsed]: Filed Dec. 16, 1952. [37]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant Marie DeSylva and, for answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

I.

Answering paragraph III thereof, defendant admits only that the George G. DeSylva mentioned therein died July 11, 1950, and that defendant is the widow of said decedent, and alleges that she is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations contained in said paragraph III.

II.

Answering paragraph VI of said complaint, defendant admits the allegations therein contained, but alleges that said paragraph does not fully state the contention of defendant; that in addition to the statement of plaintiff as to defendant's contention, [38] appearing in said paragraph beginning with the words "plaintiff is informed and believes" and ending with the words "benefits derived therefrom" (lines 16 through 26, page 3), defendant further contends that the said Stephen William Ballentine is not a child of George G. DeSylva, deceased, within the meaning of Section 24, Title 17, United States Code; and defendant further contends that, even if the said Stephen William Ballentine were

a child of the said George G. DeSylva, deceased, within the meaning of said statute, the defendant does not hold any renewals or extensions of copyrights, or any part thereof, in trust for said Stephen William Ballentine in accordance with said Section 24, Title 17, United States Code, and does not have to account to said Stephen William Ballentine for any moneys or benefits derived from said renewals or extensions in accordance with said Section 24, Title 17, United States Code; and defendant further contends that she is the sole owner of the renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest.

III.

Answering paragraph VII, defendant admits only that a demand for an accounting has been made upon defendant by plaintiff and has been refused by defendant, and denies each and every other allegation contained in said paragraph, and further alleges that plaintiff is not entitled to an accounting herein.

IV.

Defendant further alleges that plaintiff is well able to pay her own attorney's fees herein.

Wherefore, defendant prays this Court for judgment as follows:

(1) For a declaration of the respective rights and duties of the parties with respect to the subject matter of this [39] action;

(2) That it be declared that defendant Marie DeSylva is the sole owner of the renewals and exten-

sions of all copyrights in which George G. DeSylva, deceased, had an interest;

(3) That defendant recover from plaintiff defendant's costs incurred in this action;

(4) That plaintiff be ordered to pay reasonable attorney's fees to defendant, to be allowed by this Court;

(5) For such other and further relief as this Court may deem proper.

PAT A. McCORMICK and

PATRICK D. HORGAN

/s/ By PAT A. McCORMICK,

Attorneys for Defendant. [40]

Duly Verified. [41]

Affidavit of Service by Mail attached.

[Endorsed]; Filed Jan. 7, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To Defendant, Marie DeSylva, and to Pat A. McCormick and Patrick D. Horgan, Her Attorneys:

Please take notice, that on the 16th day of March, 1953, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, the undersigned will move the above entitled Court, at the Court Room of the Honorable Ernest A. Tolin, Judge of said Court in the United States Post Office and

Court House Building, at Los Angeles, California, for an order under Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in favor of plaintiff, and for such other and different relief as the Court may deem just and proper in the premises.

Said motion will be made upon the grounds that there is no genuine issue as to any material fact in connection with the relief sought and that under the undisputed facts, plaintiff is [42] entitled to judgment as a matter of law.

Said motion will be made and based upon this notice of motion, the affidavit of Leon E. Kent in support thereof, the statement of undisputed facts filed herewith, the memorandum of points and authorities in support thereof, and upon the pleadings, files, records and proceedings heretofore had herein.

Dated: March 2, 1953.

FINK, LEVINTHAL & KENT

/s/ By LEON E. KENT,

Attorneys for Plaintiff.

[Endorsed]: Filed March 6, 1953. [43]

[Title of District Court and Cause.]

AFFIDAVIT OF LEON E. KENT IN SUPPORT
OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

State of California;

County of Los Angeles—ss.

Leon E. ~~Kent~~, being duly sworn, deposes and states:

That he is one of the attorneys for plaintiff in the above entitled action. That he makes this affidavit in support of plaintiff's application for summary judgment. That affiant has personal knowledge of the facts set forth herein.

That affiant was one of the attorneys for plaintiff, Stephen William Ballentine, and for Marie Ballentine, in an action entitled DeSylva vs. Ballentine, No. 527799, filed in the Superior Court, County of Los Angeles, State of California, as well as in connection with the Matter of the Estate of George G. DeSylva, Deceased, No. 308787, probated in the Superior Court, County of Los Angeles, State of California. That in said actions, there [44] are filed documents signed by decedent, George G. DeSylva, before competent witnesses, in which documents said decedent acknowledged that plaintiff, Stephen William Ballentine, was his son. That said documents include the following, excerpts from which are attached hereto and made a part hereof by this reference:

1. Will, dated April 10, 1947, filed in the aforesaid probate proceeding.

2. Original complaint filed in the aforesaid Superior Court action.

3. Amended complaint in said action.

4. Answer to cross-complaint filed in said Superior Court action.

5. Affidavit of George G. DeSylva, dated April 20, 1947, filed in said Superior Court action.

That the aforesaid acknowledgments are acknowledgments within the meaning of Section 255 of the Probate Code of the State of California.

That in the aforesaid Superior Court action, George G. DeSylva and defendant herein, Marie DeSylva, were initially plaintiffs. That in subsequent proceedings, said Marie DeSylva was subsequently and voluntarily dismissed as a party.

That plaintiff, Stephen William Ballentine and Stephen William Moskevita are one and the same person, and that said minor has at times also been known as Stephen William DeSylva.

/s/ LEON E. KENT

Subscribed and sworn to before me this 2nd day of March, 1953.

[Seal]

/s/ BERNICE L. LUNDIN,

Notary Public in and for said County and State.

The following are excerpts from documents referred to in the foregoing affidavit.

1. The Will of George G. DeSylva, dated April 10, 1947, signed by George G. DeSylva and wit-

nessed by Wilma Montgomery; Harriet Hamilton and Lazare F. Bernhard, contains the following:

“Article One

I declare that I am married, that my wife's name is Marie DeSylva, and that we have no children the issue of this marriage. I further declare that my wife has a son by a former marriage, namely, David Shelley, born July 18, 1916; that I have a son, namely, Stephen William Moskovita, born March 10, 1944; and that neither my wife nor I have any other children, either living or deceased.”

2. The original complaint, subscribed to by the decedent, George G. DeSylva, before a notary public, in the case of DeSylva vs. Ballentine, No. 527799, Superior Court, County of Los Angeles, State of California, contains the following in paragraph II thereof:

“Plaintiff, George G. DeSylva, is informed and believes and therefore alleges that he is the father of said infant.”

3. In the amended complaint in said Superior Court action signed by said George G. DeSylva before a notary public, said George G. DeSylva stated in part that he was:

“informed by the defendant Marie Ballentine and therefore alleges upon information and belief that he is the father of said infant.”

4. In the answer to the cross-complaint in said Superior Court action signed by said George G.

DeSylva before a notary public, said George G. DeSylva stated:

"Cross-defendant is informed by the cross-complainant [46] and therefore upon information and belief admits that he is the father of said infant."

5. In a document entitled "Opposing Affidavit of George G. DeSylva", signed by said George G. DeSylva before a notary public, bearing date of April 20, 1947 and filed in said Superior Court action, said George G. DeSylva made the following statements:

"On the other hand I am perfectly willing and have been willing to provide a reasonable sum in the court's sound discretion for the support and maintenance of my son."

and further

"I am a resident of this state and have been for more than 10 years. My health is critical and I intend to remain in California and meet all my obligations including the support of my infant son."

That in referring to his son in said affidavit said George G. DeSylva was referring to said Stephen William Ballentine.

I hereby affirm that the foregoing are true excerpts taken from Will of George G. DeSylva, on file in the Matter of the Estate of George G. DeSylva, deceased, No. 308787, and from the pleadings and documents on file in the case of DeSylva vs.

Ballentine, No. 527799, in the Superior Court,
County of Los Angeles, State of California.

/s/ LEON E. KENT

Subscribed and sworn to before me this 2nd day of
March, 1953.

[Seal] /s/ BERNICE L. LUNDIN,
Notary Public in and for the State of California,
County of Los Angeles. [47]

[Endorsed]: Filed March 6, 1953.

[Title of District Court and Cause.]

STIPULATION RE STATEMENT OF FACTS

It is hereby stipulated by and between the parties
hereto, through their respective counsel, that for
the purposes of the above entitled action, the fol-
lowing facts may be deemed by the Court to be
established.

1. That Stephen William Ballentine is the son of
George G. DeSylva, Deceased, and of Marie Bal-
lentine.

2. That said George G. DeSylva and Marie Bal-
lentine were not married at the time of the birth
of said Stephen William Ballentine, or at any other
time.

Dated: January 20, 1953.

FINK, LEVINTHAL & KENT

/s/ By LEON E. KENT,

Attorneys for Plaintiff.

PAT A. McCORMICK and

PATRICK D. HORGAN

/s/ By PATRICK D. HORGAN,

Attorneys for Defendant.

[Endorsed]: Filed March 6, 1953. [59]

[Title of District Court and Cause.]

STATEMENT OF UNDISPUTED FACTS

Plaintiff contends that the following are material facts which exist without substantial controversy:

1. George G. DeSylva was the author of many musical works on which he obtained copyrights in his lifetime and said George D. DeSylva died July 11, 1950. Defendant, Marie DeSylva, is the widow of said decedent.

2. Stephen William Ballentine, also known as Stephen William Moskovita, is the son of George G. DeSylva and was born on March 10, 1944.

3. That since the death of decedent, a number of copyrights taken out in his name have been renewed in the name of defendant. That in the future, the balance of the copyrights of defendant's musical works written within the last twenty-eight years of defendant's life will come up for renewal. [56]

4. That defendant has in her possession or avail-

able to her full and complete records of all copyrights taken out by decedent and those already renewed in defendant's name, as well as of money received by defendant on account of said renewals.

5. That decedent and the mother of said child, Marie Ballentine, were not husband and wife at the times of the conception and birth of said child.

6. That the decedent during his lifetime acknowledged in writing the said child to be his own. That said acknowledgments were made before witnesses and constitute acknowledgments within the meaning of Section 255 of the Probate Code of the State of California. That among such acknowledgments are the following:

a. That by Will dated April 10, 1947, and signed by decedent before Wilma Montgomery, Harriet Hamilton and Lazare F. Bernhard, decedent acknowledged plaintiff to be his son, as follows:

"I declare that I am married, that my wife's name is Marie De Sylva, and that we have no children the issue of this marriage. I further declare that my wife has a son by a former marriage, namely, David Shelley, born July 18, 1916; that I have a son, namely, Stephen William Moskovita, born March 10, 1944; and that neither my wife nor I have any other children, either living or deceased."

In addition, at numerous places in said Will plaintiff was referred to by decedent as his son. In addition, in the Codicils to said Will, dated July 3, 1947,

and March 25, 1948, each signed by decedent in the presence of three witnesses, decedent referred to plaintiff as his son. That said Will and Codicils were offered for probate by defendant herein and were probated as the Last Will and Testament in the Estate of George G. DeSylva, Deceased, No. 308787 of the files of the Probate Court, County of Los Angeles, [57] State of California.

b. In the original complaint filed in the case of DeSylva vs. Ballentine, et al., No. 527799 of the files of the Superior Court of the County of Los Angeles, which complaint was sworn and subscribed to by decedent before a notary public on April 4, 1947, decedent stated on information and belief that he was the father of the plaintiff herein.

c. Similar statements were made in the amended complaint, the answer to the cross-complaint and the second amended complaint, all filed in said action and all subscribed and sworn to by decedent before a notary public.

d. In an affidavit subscribed and sworn to on April 20, 1947, by decedent before a notary public and filed in said action, decedent referred to plaintiff herein as his son.

e. In his written deposition taken in the said action and subscribed and sworn to on September 7, 1947, before a notary public, decedent stated in substance as follows: That he was the father of plaintiff herein as far as he knows; that he has accepted said child as his own; that he deals with this child as his own child; that he has no other

children; that he wants the child to know that he is the father; that he would like to treat the child as a son and wants the child very much to treat him as a father.

Dated: March 2, 1953.

FINK, LEVINTHAL & KENT,

/s/ By LEON E. KENT,

Attorneys for Plaintiff [58]

[Endorsed]: Filed March 6, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To the Plaintiff, Marie Ballentine, as guardian of the estate of Stephen William Ballentine, and to Fink, Levinthal & Kent, her attorneys:

Please Take Notice that on the 27th day of April, 1953, at the hour of ten o'clock a.m., or as soon thereafter as counsel can be heard, the undersigned will move the above entitled Court, in the courtroom of the Honorable Ernest A. Tolin, Judge of said Court, on the second floor of the United States Post Office and Court House Building, at Los Angeles, California, for an order under Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in favor of the defendant, and for such other and further relief as the Court may deem just and proper in the premises.

Said motion will be made upon the grounds that there is [60] no genuine issue as to any material fact in connection with the relief sought and that, under the undisputed facts, defendant is entitled to judgment as a matter of law.

Said motion will be made and based upon this notice of motion, such affidavits as may be hereafter filed with respect to said motion, the memorandum of points and authorities in support thereof and such further memoranda of points and authorities to be submitted herein, and upon the pleadings, files, records, and proceedings heretofore had herein.

Dated this 12th day of March, 1953.

PAT A. McCORMICK and
PATRICK D. HORGAN

/s/ By PAT A. McCORMICK,

Attorneys for Defendant [61]

Affidavit of Pat A. McCormick in support of defendant's motion for summary judgment and in opposition to plaintiff's motion for summary judgment.

State of California,
County of Los Angeles—ss.

Pat A. McCormick, being first duly sworn, deposes and says that he is one of the attorneys for the defendant in the above entitled proceedings and that he makes this affidavit in support of defendant's motion for summary judgment and in

opposition to plaintiff's motion for summary judgment;

Affiant is informed and believes and, upon such information and belief, alleges that with respect to the relationship between Marie Ballentine and defendant's deceased husband, George G. DeSylva, it is true that at no time prior to, at the time of, or subsequent to the birth of the minor child herein, Stephen William Ballentine, were the said Marie Ballentine and the said George G. DeSylva, nor at any of said times, did they bear the [63] relationship of husband and wife toward each other;

Affiant further states that he is the attorney for the executors of the Estate of George G. DeSylva, deceased, which said estate is presently under administration in the Superior Court of the State of California, in and for the County of Los Angeles, and that heretofore, and during the administration of said estate, various and sundry proceedings in law and equity have been filed against said executors and said estate on behalf of the said minor child herein, all of which said proceedings have since been determined by way of compromise and settlement, and under the terms of which said compromise and settlement the said minor child has received from said estate the total sum of approximately \$99,000.00, and that further under the provisions of said compromise and settlement said funds are presently being administered by a trustee in favor of said minor child.

/s/ PAT A. McCORMICK.

Subscribed and sworn to before me this 12th day of March, 1953.

[Seal] /s/ M. R. STAFFORD,

Notary Public in and for the County of Los Angeles, State of California. [64]

Affidavit of Service by Mail attached. [65]

[Endorsed]: Filed March 17, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF LEON E. KENT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

Leon E. Kent, being duly sworn, deposes and states:

That at the hearing on April 14, 1953, on the argument with respect to plaintiff's and defendant's motions for summary judgment, the Court granted leave to file this affidavit and any other papers necessary in the opinion of counsel for the purpose of completing the record.

In connection with the aforesaid motions, affiant states as follows:

1. Affiant refers to and incorporates by this reference the affidavits of Leon E. Kent, dated March 2, 1953, and March 13, 1953.

2. That the present affidavit was not previously

filed [54] because affiant believes the undisputed facts as heretofore set forth in the record justified granting of summary judgment for plaintiff.

3. As a matter of precaution and in the event the Court does not wish to hold at this time that the word "child," as used in the Copyright Act, includes any offspring of the author or at least an illegitimate child acknowledged in accordance with Section 255 of the Probate Code of the State of California, then and in that event, there would be an issue of fact which must be tried in the case. That issue of fact concerns the question of whether the plaintiff is a fully legitimated child under Section 230 of the Civil Code of the State of California.

4. Affiant is informed and believes and therefore alleges that plaintiff is a fully legitimated child within the meaning of Section 230 of the Civil Code of the State of California, and that the evidence adduced at a trial would establish such fact. That affiant can competently testify from knowledge with respect to the fact that the decedent publicly acknowledged plaintiff as his own child and received plaintiff into his family and otherwise treated plaintiff as if he were a legitimate child.

Wherefore, affiant prays that summary judgment be granted to plaintiff as prayer for, but, in the event plaintiff's motion for summary judgment be denied, then that the cause be set for trial.

/s/ LEON E. KENT.

Subscribed and sworn to before me this 17th day of April, 1953..

[Seal] /s/ BERNICE L. LUNDIN
Notary Public in and for said County and State.

Affidavit of Service by Mail attached. [86]

[Endorsed]: Filed April 20, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON SUMMARY JUDGMENT

The above entitled cause came on regularly for hearing on the 10th and 14th days of April, 1953, before the Honorable Ernest A. Tolin, Judge presiding, on defendant's motion for summary judgment, Fink, Levinthal & Kent; by Leon E. Kent, appearing as counsel for plaintiff, and Pat A. McCormick and Patrick D. Horgan, by Pat A. McCormick, appearing as counsel for defendant, and the Court having examined the documents and proofs offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises, now makes its Findings of Fact as follows: [89]

Findings of Fact

I.

George G. DeSylva was the owner of many musical works on which he obtained copyrights in his lifetime, and said George G. DeSylva died July 11,

1950. Defendant Marie DeSylva is the widow of said decedent.

II.

Plaintiff, Stephen William Ballentine, also known as Stephen William Moskovita, is the son of George G. DeSylva and was born on March 10, 1944.

III.

That Marie Ballentine is the mother of said child and that decedent and said Marie Ballentine were not husband and wife at the times of the conception and birth of the said child.

IV.

That decedent during his lifetime acknowledged in writing that plaintiff, Stephen William Ballentine, was his child; that said acknowledgments were made before witnesses and constitute acknowledgments within the meaning of Section 255 of the Probate Code of the State of California.

V.

That since the death of decedent a number of copyrights taken out in his name have been renewed in the name of defendant. That in the future, the balance of the copyrights of decedent's musical works, written within the last twenty-eight years of decedent's life, will come up for renewal. [90]

VI.

That demand has been made upon defendant by plaintiff for an accounting of moneys and benefits

derived by defendant as a result of said renewals in defendant's name; that said demand has been refused by defendant.

VII.

That an actual and bona fide dispute has arisen between plaintiff and defendant with respect to their respective rights in the musical works copyrighted during the last twenty-eight years of decedent's life.

VIII.

That an accounting by defendant with respect to the copyrights and renewals thereof on decedent's musical compositions, as well as moneys received therefrom, is not necessary.

IX.

That the defendant is the sole owner of the right to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest.

Conclusions of Law

From the foregoing facts, the Court makes its Conclusions of Law as follows:

That defendant is entitled to judgment herein as follows:

(1) That it be declared, determined and adjudged by this Court that, in accordance with Section 24 of [91] Title 17, United States Code, so long as defendant Marie DeSylva is alive, said defendant is the sole owner of all right to renewals and ex-

tensions of all copyrights in which George G. DeSylva, deceased, had an interest.

(2) That Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights.

(3) That the plaintiff herein has no right to an accounting from defendant for moneys or benefits obtained as a result of renewals and extensions of copyrights obtained by defendant, nor is plaintiff entitled to an accounting as to any such renewals or extensions of copyrights in the future so long as said defendant is alive.

(4) That defendant is entitled to judgment for costs and disbursements incurred or expended herein.

Let judgment be entered accordingly.

Dated this 29th day of April, 1953.

/s/ ERNEST A. TOLIN,

United States District Judge

[Endorsed]: Filed April 29, 1953. [92]

In the United States District Court in and for the
Southern District of California, Central Division

No. 14-400-T

MARIE BALLENTINE, as Guardian of the Estate
of STEPHEN WILLIAM BALLENTINE,
Plaintiff,

vs.

MARIE DeSYLVA, Defendant.

JUDGMENT

The above entitled cause came on regularly for hearing on the 10th and 14th days of April, 1953, before the Honorable Ernest A. Tolin, Judge presiding, on defendant's motion for summary judgment, Fink, Levinthal & Kent, by Leon E. Kent, appearing as counsel for plaintiff, and Pat A. McCormick and Patrick D. Horgan, by Pat A. McCormick, appearing as counsel for defendant, and the Court having examined the documents and proof offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions [93] of Law on Summary Judgment, and having directed that judgment be entered in accordance therewith:

Now, Therefore, by reason of the law and findings aforesaid,

It Is Hereby Ordered, Adjudged and Decreed:

1. That, in accordance with Section 24 of Title 17, United States Code, so long as defendant Marie DeSylva is alive, said defendant is the sole owner of all right to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest;

2. That the plaintiff herein has no right to an accounting from defendant for moneys or benefits obtained as a result of renewals and extensions of copyrights obtained by defendant, nor is plaintiff entitled to an accounting as to any such renewals or extensions of copyrights in the future so long as said defendant is alive;

3. That defendant is awarded her costs and disbursements incurred or expended herein in the sum of \$.....

The Clerk is ordered to enter this Judgment.

Dated: This 29th day of April, 1953.

/s/ ERNEST A. TOLIN,

United States District Judge

[Endorsed]: Filed April 29, 1953. [94]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the clerk of the above entitled court and to defendant, Marie DeSylva, and Pat A. McCormick and Patrick D. Horgan, her attorneys:

Notice Is Hereby Given that Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, Plaintiff, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on April 29, 1953.

Dated: May 6, 1953.

FINK, LEVINTHAL & KENT,

/s/ By LEON E. KENT. [95]

Affidavit of Service by Mail attached. [96]

[Endorsed]: Filed May 11, 1953.

[Title of District Court and Cause.].

NOTICE OF APPEAL

To the clerk of the above entitled court and to the plaintiff, Marie Ballentine, as guardian of the estate of Stephen William Ballentine, and to Fink, Levinthal & Kent and Leon E. Kent, her attorneys:

Notice Is Hereby Given that Marie DeSylva, defendant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from that portion only of that judgment entered

wherein on April 29, 1953, wherein said judgment includes and makes a part thereof the following portion of the Conclusions of Law made by the Court herein:

"(2) That Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights."

Dated this 18th day of May, 1953.

PAT A. McCORMICK and
PATRICK D. HORGAN

/s/ By PATRICK D. HORGAN,

Attorneys for Defendant. [97]

Affidavit of Service by Mail attached. [98]

[Endorsed]: Filed May 19, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 111, inclusive, contain the original Complaint; Notice of Hearing of Motions to Dismiss the Complaint; to Strike Certain Matters from the Complaint and for Enlargement of Time; Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss; Order Denying Defendant's Motion to Dismiss; Answer; Notice of Motion for Summary Judgment, Plaintiff's; Affidavit of Leon E. Kent in

Support of Plaintiff's Motion for Summary Judgment; Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment; Statement of Undisputed Facts; Stipulation re Statement of Facts; Notice of Motion for Summary Judgment, Points and Authorities and Affidavit in Support; Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Defendant's; Affidavit of Leon E. Kent in Opposition to Defendant's Motion for Summary Judgment; Memorandum re Motions for Summary Judgment; Findings of Fact and Conclusions of Law on Summary Judgment; Judgment; Notice of Appeal, Plaintiff's; Notice of Appeal, Defendant's; Designation of Contents of Record on Appeal and Statement of Points, Plaintiff's; Designation of Additional Portions of Record on Appeal; and Designation of Contents of Record on Appeal and Statement of Points, Defendant's, which constitute the transcript of record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, one-half of which has been paid by each of the parties.

Witness my hand and the seal of said District Court this 18th day of June, A.D., 1953.

[Seal]

EDMUND L. SMITH,

Clerk

/s/ By THEODORE HOCKE,

Chief Deputy

[Endorsed]: No. 13880. United States Court of Appeals for the Ninth Circuit. Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, Appellant, vs. Marie DeSylva, Appellee. Marie DeSylva, Appellant, vs. Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: June 19, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13880

MARIE BALLENTINE, as Guardian of the Estate
of STEPHEN WILLIAM BALLENTINE,

Appellant and Cross-Appellee

vs.

MARIE DeSYLVA,

Appellee and Cross-Appellant

STATEMENTS OF POINTS ON WHICH
APPELLANT INTENDS TO
RELY ON APPEAL

Comes Now appellant and cross-appellee herein and states that she intends on her appeal in the above entitled cause to rely on the following points as error:

1. That the Court erred in finding that an accounting by defendant with respect to the copyrights and renewals thereof on decedent's musical compositions, as well as moneys received therefrom, is not necessary. (Finding VIII.)

2. That the Court erred in finding that the defendant is the sole owner of the right to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest. (Finding IX.)

3. That the Court erred in holding that so long as defendant, Marie DeSylva, is alive, said defendant is the sole owner of all right to renewals and extensions of all copyrights in which George G. DeSylva, Deceased, had an interest in accordance with Section 24 of Title 17, United States Code.

4. That the Court erred in holding that plaintiff herein had no right to an accounting from defendant for moneys or benefits obtained as a result of renewals and extensions of copyrights obtained by defendant, and the further holding that plaintiff was not entitled to an accounting of any such renewals or extensions of copyrights in the future so long as said defendant is alive.

5. That the Court erred in rendering judgment for defendant.

6. That the Court erred in failing to rule that plaintiff was at least equally entitled with defendant to the renewals and extensions of copyrights in which George G. DeSylva had an interest, which renewals and extensions were effected after his death.

7. That the Court erred in failing to rule that plaintiff was entitled to an accounting from defendant in connection with such renewals and extensions of copyrights obtained by defendant.

8. That the Court erred in ruling that under Section 24 of Title 17, United States Code, the widow of a deceased author is entitled to the renewals and extensions of copyrights owned by said author, where such renewals and extensions are effected after the death of the author, to the exclusion of children of the author, and that the children of the author are not entitled to share in such renewals and extensions so long as the widow is alive.

Dated: June 30, 1953.

FINK, LEVINTHAL & KENT

/s/ By **LEON E. KENT,**

**Attorneys for Appellant
and Cross Appellee**

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 2, 1953. Paul P. O'Brien,
Clerk.

[Title of U.S. Court of Appeals and Cause.]

**DESIGNATION BY APPELLANT OF POR-
TIONS OF RECORD TO BE PRINTED**

To the clerk of the above entitled court, to appellee and cross-appellant, and to Messrs. Pat A. McCormick and Patrick D. Horgan, attorneys for appellee and cross-appellant:

You, and Each of You, Will Please Take Notice

that appellant and cross-appellee herein designates those portions of the record herein which appellant believes necessary for the consideration of the points on which appellant intends to rely on her appeal in the above entitled action.

Reference is to pages as designated in the record as prepared by the Clerk of the United States District Court herein.

1. Complaint, pp. 2-6 inclusive (omitting, however, the exhibit to the Complaint, pp. 7-12 inclusive).

2. Answer, pp. 38-41 inclusive.

3. Motion of defendant to dismiss the Complaint. (Appellant requests that there be printed only the actual motion to dismiss, consisting of lines 1-7 of defendant's motion No. 1, pp. 13 and 14 only).

4. Plaintiff's Memorandum of Points and Authorities in opposition to defendant's motion to dismiss. (Appellant requests that there be printed only that portion of said Memorandum beginning on line 23 of p. 32 to and including line 24 of p. 34, and that the balance of said Memorandum be omitted from the printing.)

5. Order denying defendant's motion to dismiss, p. 37.

6. Plaintiff's motion for summary judgment, p. 42.

7. Affidavit of Leon E. Kent in support of plaintiff's motion for summary judgment, pp. 44-47 inclusive.

8. Stipulation re statement of facts, dated January 20, 1953, p. 59.

9. Statement of undisputed facts by plaintiff, dated March 2, 1953, p. 56.

10. Defendant's notice of motion for summary judgment, dated March 12, 1953, pp. 63-65 inclusive.

11. Affidavit of Leon E. Kent in opposition to defendant's motion for summary judgment, dated April 17, 1953, p. 64.

12. Findings of Fact and Conclusions of Law on summary judgment, pp. 89-92 inclusive.

13. Judgment, pp. 93 and 94.

14. Notice of Appeal by plaintiff, pp. 95-96 inclusive.

15. This designation and any all counter-designations and orders filed or entered in connection with the designation of portions of the record herein to be printed.

16. Statement of points on which appellant intends to rely on appeal.

17. Certificate of Clerk.

Dated: June 30, 1953.

FINK, LEVINTHAL & KENT

/s/ By LEON E. KENT,

Attorneys for Appellant

and Cross-Appellee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 2, 1953. Paul P. O'Brien,
Clerk.

[Title of U.S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
CROSS-APPELLANT^o INTENDS
TO RELY ON APPEAL

Comes Now Marie DeSylva, appellee and cross-appellant herein and states that she intends on her cross-appeal to the United States^o Court of Appeals for the Ninth Circuit to rely on the following point only as on said cross-appeal:

1. That the United States District Court erred in making its following Conclusion of Law:

“(2) That Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights.”

Dated: This 25th day of June, 1953.

PAT A. McCORMICK and
PATRICK D. HORGAN

/s/ By PAT A. McCORMICK,

Attorneys for Appellee and
Cross-appellant Marie DeSylva

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 29, 1953. Paul P. O'Brien,
Clerk.

[Title of U.S. Court of Appeals and Cause.]

DESIGNATION BY CROSS-APPELLANT OF PORTIONS OF RECORD TO BE PRINTED

To the clerk of the above entitled court, to appellant and cross-appellee, and to Messrs. Fink, Levinthal and Kent, attorneys for appellant and cross-appellees:

You, and Each of You, Will Please Take Notice that Marie DeSylva, appellee and cross-appellant herein, designates those portions of the record herein which cross-appellant believes necessary for the consideration of the point on which said cross-appellant intends to rely on her cross-appeal to the United States Court of Appeals for the Ninth Circuit.

References to pages herein are to those pages as designated in the record as prepared by the Clerk of the United States District Court herein:

1. Complaint, pp. 2-6 inclusive (omitting, however, the exhibit to the complaint, pp. 7-12 inclusive).

2. Answer, pp. 38-41 inclusive.

3. Motion of defendant to dismiss the complaint.

(Cross-appellant requests that there be printed only the actual motion to dismiss, consisting of lines 1 to 7 of defendant's motion Number 1, pp. 13 and 14 only.)

4. Order denying defendant's motion to dismiss, page 37.

5. Plaintiff's motion for summary judgment, page 42.

6. Affidavit of Leon E. Kent in support of plaintiff's motion for summary judgment, pp. 44-47 inclusive.

7. Statement of facts dated January 20, 1953, page 59.

8. Defendant's notice of motion for summary judgment, pp. 60 and 61.

9. Affidavit of Pat A. McCormick in support of defendant's motion for summary judgment, pp. 63-65 inclusive.

10. Findings of Fact and Conclusions of Law, pp. 89-92 inclusive.

11. Judgment, pp. 93 and 94.

12. Notice of Appeal by plaintiff, pp. 85-96, inclusive.

13. Defendant's Notice of Appeal, pp. 97-98 inclusive.

14. This designation and any and all counter designations and orders filed or entered in connection with the designation of portions of the record herein to be printed.

15. Statement of points on which cross-appellant intends to rely on appeal.

Dated: This 25th day of June, 1953.

**PAT A. McCORMICK and
PATRICK D. HORGAN**

/s/ By **PAT A. McCORMICK,**
Attorney for Apellee and
Cross-Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 29, 1953. Paul P. O'Brien,
Clerk.

[fol. 46] IN UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

ORDER OF SUBMISSION—February 7, 1955

Ordered appeals herein argued by Mr. Leo E. Kent, counsel for Marie Ballentine, and by Mr. Pat A. McCormick, counsel for Marie DeSylva, and submitted to the Court for consideration and decision, with leave to counsel for the respective parties to file further memoranda within 10 days from date:

[fol. 47] IN UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RE-
CORDING OF JUDGMENT—August 25, 1955

Ordered that the typewritten opinion, and dissenting opinion of Fee, Circuit Judge, this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the majority opinion rendered.

[fol. 48] IN UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

No. 13,880

MARIE BALLENTINE, as Guardian of the Estate of Stephen
William Ballentine, Appellant,

vs.

MARIE DESYLVA, Appellee

MARIE DESYLVA, Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen
William Ballentine, Appellee

OPINION—August 25, 1955

Appeals from the United States District Court for the
Southern District of California, Central Division

Before Stephens, Fee, and Chambers, Circuit Judges

STEPHENS, Circuit Judge:

This litigation began with the filing in the United States District Court of a complaint by Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, a minor, as plaintiff, for declaratory relief against Marie DeSylva, as defendant. The defendant filed motions to dismiss the complaint, to strike therefrom, and for enlargement of time. The district court denied the motion to dismiss, and the other motions seem never to have been acted upon. The defendant answered the complaint, and in the answer herself prayed for a declaratory judgment.

[fol. 49] Upon these pleadings, together with an agreed "Statement of Undisputed Facts", "Stipulation Re Statement of Facts", and affidavits, the cause was submitted to the district court upon the defendant's motion for a summary judgment over the objection of the plaintiff. The plaintiff also made a motion for summary judgment which was not directly ruled upon. Findings of fact and con-

clusions of law, and judgment for defendant followed, to the effect that:

(1) Defendant is the sole owner of all right to renewals and extensions of all copyrights in which George G. DeSylva, now deceased, had an interest.

(2) Plaintiff is not entitled to an accounting.

The plaintiff appealed from the judgment.

The defendant appealed from that part of the judgment, as set out in her notice of appeal, to-wit, wherein said judgment includes and makes a part thereof the following portion of the Conclusions of Law made by the Court herein:

"(2) That Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights."

Neither party makes any point on appeal as to the propriety of the district court's action in submitting the cause for a summary judgment.

In the interest of keeping the parties correctly in mind we shall, throughout this opinion, refer to the plaintiff-appellant and cross-appellee, Marie Ballentine, as the plaintiff or the plaintiff-mother, and to the defendant-appellee and cross-appellant, Marie DeSylva, as the defendant or the defendant-widow.

George G. DeSylva, who died July 11, 1950, was the author of numerous musical compositions which were copyrighted. Marie DeSylva, the defendant, is his surviving widow. Acting under claimed rights as she construed Section 24 of Title 17 United States Code, she applied for and received renewals of certain of the copyrights above referred to. Other of the copyrights will, in the future, be subject to renewal.

Marie Ballentine, the plaintiff, is the mother of her ward, Stephen William Ballentine, and George G. DeSylva was [fol. 50] his father. The parents were never married. The plaintiff brought the action for a declaratory judgment praying for an adjudication that the child together with the widow as a class, possesses the right to copyright renewals and that the widow, having acted to acquire and having ac-

quired renewals, must account to the child as to benefits received and also account upon future receipts of benefits.

The defendant widow disagrees with the plaintiff mother, and contends that her rights are not in a class with those of the child but are in a preferential class. She also contends that, under the applicable sections of the copyright statute the rights given to "children", as that word is used in the statute, encompass rights to legitimate children only.

The trial judge, in his Findings of Fact and Conclusions of Law, determined that Stephen William Ballentine was the "child" of George G. DeSylva under the applicable section of the copyright law, in conformity with the plaintiff-mother's claim, but construed the copyright statute as providing that the surviving widow, the defendant, has a preferential right over the child. Under such construction, the judgment went for the defendant widow in accordance with her claim that she has the first right and, consistently, no accounting was required.

Is The Widow in a Class with the Child?

We turn directly to the statute, Title 17 U.S.C.A. § 24, which reads in part:

"That * * *, the author of such work, if still living, or the widow, * * * or children of the author, if the author be not living, or if such author, widow, * * * or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright * * *." (July 30, 1947, c. 391, § 1, 61 Stat. 652) ¹⁸

Without § 24, the author's work automatically would enter the public domain upon the expiration of the original copyright term. Under the Act including § 24, the original copyright [fol. 51] right and its ownership, upon expiration of the term of the copyright, is dead; but a new copyright may issue. And it may issue only to and upon application of certain persons who fall into several different categories, as to preference. In this manner the Congress has acted to extend the benefits of the author's work beyond the origi-

¹⁸ For history of § 24, see "Historical Note" following § 24 of Title 17, U.S.C.A.

nal copyright term to the author and after his decease to persons who are the natural objects of the author's bounty, and if none, to others under the formula of the Act. The right, sometimes called the renewal right, after the author's death goes directly, and not by the inheritance, to indicated members of his family who survive him. If none of the family survives him and there is a will, the right to act goes to the person or persons whom the author has designated as executors. If there is no will and no surviving member of the immediate family, then to the next of kin. The unexercised right itself never goes into a deceased person's state as property. As to the assignment of expectancy of right of renewal, see *Edward B. Marks Music Corp v. Jerry Vogel Music Co.*, SD. N.Y., 1942, 47 F.Supp.490; *Carmichael v. Mills Music*, SD. N.Y., 1954, 121 F.Supp. 43.

It is the logic of the plaintiff-mother that the children of the author are as definitely objects of the author's natural bounty as the widow, and, consistent with the purposes of the Act, that the phrase, "or the widow, * * * or children of the Author", does not mean *either the widow or the children*, the one to the exclusion of the other, but means both together as one classification. She supports her contention by pointing out that there is in the Act a qualifying phrase between each of the enumerated classes which are entitled to the right. Thus, the *author* is entitled to the renewal, and then follows the qualifying phrase, "if [he is] still living"; next the *widow or children* are entitled to the renewal, and then follows the qualifying phrase, "if the author be not living". It will be noticed that in the Act there is no qualifying phrase between "widow, * * * or children of the author" to separate the one from the other as separate enumerated classes. By the structure of the Act it would follow that the widow with the children constitute one inseparable class. There is much to commend the logic of this construction. It is not illogical to grant the renewal right to the author, but after his or her decease to the family as a group, mother and children or father and [fol. 52] children, for the family's benefit. There is merit in the plaintiff-mother's view point that the defendant-widow, who in this case is not the mother of the subject child, is not in a class separate from and exclusive of the

author's children, else there would have been a separating phrase in the Act such as, "or if the widow is not living; then the children".

The mother, acting for and in the interests of the boy, points out that an early draft of the Copyright Act had in it such a qualifying phrase, but that the phrase was dropped in the draft adopted, and she argues therefrom that the Congressional intent was to place the surviving spouse and children in a class together as those first entitled to the renewal of the copyright after the death of the author. She also points to Circular 15 of the Copyright Office,¹ as sus-

¹ "The following persons are entitled to claim a renewal copyright:

"1. Aside from the groups of works mentioned in Paragraph 2, below, renewal copyrights in all works (including works by individual authors which appeared in periodicals or in cyclopaedic or other composite works), may be claimed by the following groups of persons:

"a. The author of the work, if he is still living at the time when renewal is sought.

"b. If the author is not living, his widow (or widower), or children may claim renewal.

"c. If neither the author, his widow (or widower), nor any of his children are living, and the author left a will, the author's executor may claim renewal.

"d. If the author died without leaving a will, and neither his widow (or widower) nor any of his children are living, his next of kin may claim renewal." [Emphasis added] Circular 15 of the Copyright Office, entitled "Instructions for Securing Registration of Claims to Renewal Copyrights" excerpt as quoted by plaintiff-mother (appellant) in her opening brief, p. 9, note 7.

The above statement is consistent with the letter of Mr. George D. Cary, Principal Legal Advisor to Copyright Office, which letter constitutes note 8 on page 10 of appellant's (plaintiff-mother's) brief. We have not considered

taining the interpretation she contends for. An excerpt from it is quoted in the margin in footnote 1.

[fol. 53] Returning to the construction of the Act, we read it as providing for a new right by the renewal of the copyright. First, the author may act under the right. Next, but after the author's death, either the widow or the children are free to act. And it is highly important to observe that the "right" of the renewal never goes into an estate of a decedent. If not acted upon, the right dies. And the possession of the right is provided for in the Act and is not dependent upon or fixed by the law of descent.

But if we are to assume that the Congress meant to prefer one or the other, which one, the children or the spouse, is preferred? Can it be that the one who acts first gets the prize? We know of no language construction in English or in the law which confers a right over another merely because one is first named in a category of two or more, each of which is [fol. 54] separated by a disjunctive. We think the right to

this letter, since the record is not clear that it was in evidence. We do not take judicial notice of it.

Both sides concede that there are no decided cases upon the point, and the mother is right in asserting, at page 9 of her opening brief:

"In the absence of direct case authority, the construction [by] those charged with the duty of executing the statute is entitled to persuasive weight and ought not to be overruled without cogent reasons."

See Tennenbaum, *Practical Problems in Copyright*, CCH Law Handybook—7 Copyright Problems Analyzed (1952), pages 7, 12:

"Whether the widow takes precedence over the children in renewing the copyright has not been adjudicated, although this question is constantly troubling the Copyright Bar. The sound and only proper view is that the widow and children are members of the same class, any member of which can apply for the renewal and obtain legal title to the renewal, but he will be deemed a trustee thereof for the other members of the class. If it were the intention to give the widow precedence over the children, the Act would have so

the renewal is granted to the class through action by the surviving spouse or children.

Here there is not a designation of one over the other, and the word "or" is given its full disjunctive meaning. The Act does not say, as contended by the widow, that upon the author's death the widow may act and if the widow is dead the children may act; it plainly says that *either* may act if the author (husband-father) dies. And it would be entirely out of the beneficent purpose of the Act to construe it as providing that when either acts, the other is cut off. It would seem reasonable to say that if additional words must be added to construe the sentence so as to fit either contention made by the parties, words should be added which best place the Act in implementation of its purposes.

Defendant widow cites the case of *Travers v. Reinhardt*, 1907, 205 U.S. 423, as a case wherein the court, in a situation said to be "in much the same circumstances" as in our case, refused to construe the word "or" as "and", as she argues must be done in our case if the widow with the child constitute one class. The circumstances in the cited case, as it seems to ~~us~~ were very different from those of our case. In

stated. The section would then have read, that the widow could renew, if the author is not living, or if neither the author or widow is living, then the renewal should be by the children.

"The injustice of holding otherwise is evident in the case where an author has been married several times and was survived by children by a prior marriage.

"Could it be said that the Act intended that the wife who was the widow at the death of the author should take the entire renewal to the exclusion of the children by a prior marriage? Where the widow and several children survive, and one child files a renewal, he holds the legal title for himself as trustee for the widow and each of the other children."

See, also, 2 Warner, Radio and Television Rights, 246, Sec. 81; 2 Socolow, The Law of Radio Broadcasting, page 1218. Compare *Silverman v. Sunrise Pictures Corp.*, 1921, 2 Cir., 273 F. 909, 912, cert. den. 262 U.S. 758; 43 S.Ct. 705, 67 L.Ed. 1219.

the cited case a testator in a codicil or will used the phrase "without leaving a wife or a child or children". It was claimed that the testator meant, without leaving a "wife and child". The argument was that the testator intended his real estate to descend through the line of his sons. The court held that it saw nothing in the circumstances to indicate any intention to use the word in any but the disjunctive sense. We do not think the case is persuasive to defendant's point.

And we say the same for another case treated in the brief: *Silverman v. Sunrise Pictures Corp.*, 1921, 2 Cir., 273 F. 909. Therein the court says:

"The purpose * * * is to give to the persons enumerated in the order of their enumeration * * * a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty." [Emphasis added]

But the order of enumeration is not necessarily the right of the widow over the right of the children for, as pointed out [fol. 55] above, the second enumeration would seem to include both as a class with the privilege of either widow or children to act for both. See *Silverman v. Sunrise Pictures Corp.*, 1921, 273 F. 909. And certainly, both can be properly expectant of the author's bounty, and in many states including California parents are legally liable to support their children.

The defendant widow cites Vol. 18 *Corpus Juris Secundum* 204, wherein it is stated at §79 in the text, that the renewal of the copyright is in:

"* * * the author, if living, or in the author's widow, widower, children, executors, or next of kin, in the order stated * * *." [Emphasis added]

This text is a carry-over from Vol. 13 *Corpus Juris* 1090, §239. It will be noticed that the text of the statute is not quoted. The commentator (in *Corpus Juris Secundum* and in *Corpus Juris*, supra) entirely misses a correct statement which gives rise to the issue in the instant case, by omitting the "or" which, in the statute, is between the words "widower" and "children", and by omitting the word

"then" just before referring to "executors". The commentator gives no meaning whatever to the qualifying phrases. The subject sentence reads:

"* * * the author of such work; if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work * * *." Title 17 U.S.C.A. §24, Copyrights.

It is clear that the commentator followed his preconceived meaning of the Act, rather than the text of the Act. Then, upon such preconceived idea, he completely omits any mention of the fact that there is an intervening qualifying phrase between all of the categories except the category which includes both spouse and children. The absence of the qualifying phrase between "widow, widower" and "or children of the author" indicates, we think, rather plainly that the expression in the Act, "widow, widower, or children [fol. 56] of the author", is one inseparable category or enumeration of the several persons who are given the right of renewal. But the commentator by his own boot-straps interpolates his own phrase "in the order stated", citing only *White-Smith Publishing Co. v. Goff*, 1911, 1 Cir., 187 F. 247.

The text in Vol. 34 *American Jurisprudence* 423, §32, is much the same, though the phrase "in the order named" is not used; however, the expression that the right goes to those "in the order of enumeration" is used. We have hereinbefore treated that expression. There is no decided authority cited.

Margaret Nicholson, in her "*A Manual of Copyright Practice*" (1945), interpolates, but without analysis or authority, at page 195:

"The publisher may renew the copyright in the name of the widow or widower, if there is one; of the child or children, if there is no widow or widower * * *."
[Emphasis added]

No place in the statute is there any such phrase, "if there is one", nor is there any such phrase as "if there is no widow or widower". These phrases are mere additions to the statute to support the commentator's opinion. There is no showing whatever as to the course of reasoning followed in arriving at such opinion.

To the same effect are the following: "*Risks and Rights in Publishing, Television, Radio*" etc., by Samuel Sprigg; "*An Outline of Copyright Law*" (1925 by Richard C. De Wolf; 28 *Op. Attys. General* 162, Ass't Attorney General Fowler.

We conclude that the word "or" between the words "widower", "children", must be construed as expressing the alternative and means that either one or the other may act for the family which consists of the widow (or widower) and all of the children. See *Pierpont v. Fowle*, 19 Fed. Case No. 11,152.

Is the Illegitimate Child Excluded From All Rights Under the Renewal Privileges of the Copyright Act?

Since we have determined that the right of renewal of the copyright of a deceased author is in the class designated in the Act as "widow, widower, or children", and such renewal is for the benefit of the surviving spouse and children [fol. 57] together, we must determine whether in our case the son of the author, having been born outside of wedlock, qualifies as a "child" under the meaning of the Copyright Act. The trial court found, as we have said, that the subject illegitimate child does so qualify. The finding is quoted in the margin.²

² "IV. That decedent during his lifetime acknowledged in writing that plaintiff, Stephen William Ballentine, was his child; that said acknowledgments were made before witnesses and constitute acknowledgments within the meaning of Section 255 of the Probate Code of the State of California." Findings of Fact and Conclusions of Law on Summary Judgment, Record p. 29. And the trial court made a Conclusion of Law, as follows:

"(2) That Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights." Ibid, p. 32.

In approaching the problem just stated, it will be well to have clearly in mind the fact that the right conferred by the Copyright Act is not a renewal or extension of a property which descends in an estate but is a new, personal grant of a right. Such right is a newly granted and created one, without which or without action under it, the work of the author would enter the public domain.

In both the common law and the civil law, the legal rights and privileges of the child born out of wedlock were severely restricted. He occupied a status in social relation to others tainted with disgrace as the product of shame. As time went on, the harshness accorded the child softened, but has never been completely eliminated. Convention is based upon a phase of common opinion more or less reasonable at a given time, but sometimes persists under the illogic of prejudice long after the reason for it has expired.

Both Blackstone and Kent state that the common law legal restrictions upon illegitimate children are in relation to property inheritance and to qualification to hold church office.³

The English law as to property inheritance became a part of the basic law of the United States, but since our Constitution provided for the complete separation of Church and State, the restrictions as to church offices were foreign to our system of government.

Without going into detail as so many opinion writers have done resulting in considerable confusion and inconsistencies, it suffices to say that the very old English law shut out illegitimates from inheriting from either parent, but later the law allowed them to inherit from the mother only. Such was the common law of England and her American colonies, and continued as to the basic American law after Independence. This is not to say, however, that the English common law as of the date of our Independence was from that date static. On the contrary, it continued to change as it had done through the years in its original

³ See Blackstone (1 Bl. Comm. New Ed., 1825) 492; Kent, Commentaries on American Law (11 Ed., 1867) Vol. 2, p. 230; Ayer, Legitimacy and Marriage (1902); 16 Harv. L. Rev. 22, 23.

habitat, to meet the changes in our own civilization. The harshness of one generation may be tempered in the next by judicial cognizance of material change.

The old English rule was that the illegitimate child is the child of no one, or *quæ nullius filius*, hence is not a child at all where the word "child" or "children" is used in the devolution of real property, except in circumstances showing the opposite intention. If it may continue in this country except where modified by statute, we think there is no occasion to extend its application beyond the original purpose, and courts of both federal and state jurisdiction show a decided trend in that direction.

The old English case of *Wilkinson v. Adams*, 1812, 1 Ves. & Bea. 422, 462, 35 Eng. Rep. 163, 179, is cited by the defendant-appellee widow in our case as authority for the limitation put upon the meaning of the word "child". We have analyzed the argument of counsel in that case which is set out in extenso in the report and advisory opinion of three judges, and in the extensive opinion by Lord Eldon. It is held in the latter's opinion that in the construction of a will in relation to real estate, the word "child" (or children) will not be taken to include an illegitimate child unless it can be gleaned from the will itself that such was the intent of the testator. That in case such intent is found, either from direct statement or by reasonable inference, an illegitimate child does not take until and unless it has acquired through "Time and Reputation" an identity as [fol. 59] the child of the testator. The case is replete with analyses of precedent cases, several of which reveal that the judges rendered their decisions adverse to the interest of illegitimate children with great reluctance because circumstances outside the wills themselves indicated plainly that the testators meant their bounty to go to the illegitimate children. In some cases the harsh ruling was avoided through stratagem. It is interesting to note that the opinion of Lord Chancellor Eldon at the outset is specific that the point considered "regards the real estate" as the title is affected by the will. And the Lord Chancellor, in the course of his opinion, states that the limitations as to the *prima facie* meaning of the word "child" derives from Coke, and the citations are solely "Cases of Deeds". Coke, in *Co. Lit.* 3b. To the same intent is the case of

McCool v. Smith, 1861, 66 U.S. 459, 470. A sweeping statement used in the *McCool* case has had wide quotation, sometimes out of context. The statement is:

"By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate, unless a different intention is clearly manifested."

The statement would be more accurate and would be within the issues of the case it was used in if it had had words limiting it to the statutes referring to title or succession of real property. See *Heller v. Teale*, 1914, 216 F. 387, 398, citing *McCool v. Smith*, *supra*.

We think these leading cases are confirmative of the theory that the limitation put upon the word "child" is based upon the importance of land titles and inheriting of land interests, that they are not properly authority for extensions of the doctrine outside the original purpose of the limitation. Since the doctrine arose from consideration of real estate transfers and succession, we see no necessity or legal propriety in holding that Congress intended, in enacting the Copyright Act, to exclude the illegitimate children of the author if the widow survived, and that such intention cannot be read from the text of the Act.⁴

The cited case appears to be contrary to the theory which we approve, as it extended the limitation to the benefit of recovery of damages.

⁴ It will be noted that there is no problem as to the identity of the illegitimate child in the instant case, as it is agreed in the "Statement of Undisputed Facts" by the parties that the child Stephen is the illegitimate child of the author and has been publicly acknowledged by the father-author as such. Record on Appeal, p. 21.

[fol. 60] It is true that it was said in the English case of *Dickinson v. North-Eastern Ry. Co.* 1863 9 Law Times Rep. 299, 300 (Pollock, C.B.):

"We have no doubt that in this act of Parliament [Lord Campbell's Act, 9 & 10 Vict. c. 93], as in all others, the word 'child' means 'legitimate' child only."

In *Hutchinson Investment Co. v. Caldwell*, 1894, 152 U.S. 65, 68, the United States Supreme Court was called upon to construe the federal land preemption law. The decision was that the word "heirs" should be construed, not as those who could be heirs at common law but as those who could be heirs in the state in which the land lay. We quote from the Supreme Court's opinion in the margin.⁵

"We are unable to concur with counsel for plaintiffs in error that the intention should be ascribed to Congress of limiting the word 'heirs of the deceased preemptor', as used in the section, to persons who would be heirs at common law (children not born in lawful matrimony being therefore excluded) rather than those who might be such according to the *lex rei sitae*, by which, generally speaking, the question of the descent and heirship of real estate is exclusively governed. If such had been the intention, it seems clear that a definition of the word 'heirs' would have been given, so as to withdraw patents issued under this section from the operation of the settled rule upon the subject. * * *

"But it is contended that the word 'heirs' was used in its common law sense, and it is true that technical legal terms are usually taken, in the absence of a countervailing intent, in their established common law signification, but that consideration has no controlling weight in the construction of this statute. Undoubtedly the word 'heirs' was used as meaning, as at common law, those capable of inheriting, but it does not follow that the question as to who possessed that capability was thereby designed to be determined otherwise than by the law of the State which was both the situs of the land and the domicile of the owner.

"The object sought to be attained by Congress was that those who would have taken the land on the death of the preemptor, if the patent had issued to him, should still obtain it notwithstanding his death, an object which would be in part defeated by the exclusion of any who would have so taken by the local law if the title had vested in him. * * * If the provision admitted of more than one construction, that one should be adopted which best seems to carry

[fol. 64] In the case of *Middleton v. Luckenbach S.S. Co.*, 2 Cir., 1934, 70 F. 2d 326, 329, 330 the issue was whether an illegitimate child could recover for the death of its mother, and whether a mother could recover for the death of an illegitimate child under the Federal Death Act of 1920 (Title 46 U.S.C.A. §761), which provided for damage suits for the benefit of decedent's wife, husband, parent, child, or dependent relative. To the same general effect, see *Campagne Generale Transatlantique v. United States*, 1948, 78 F. Supp. 797. We quote from the *Middleton* (supra) opinion in the margin."

out the purposes of the act. * * *." *Hutchinson Investment Co. v. Caldwell*, 1894, 152 U.S. 65, 68, 69.

"There is nothing to the contrary in *McCool v. Smith*, 1 Black, 459 [1861, 66 U.S. 459, 470], which was a case coming to this court from Illinois, in which it was held that the meaning of the words 'next of kin' was to be determined by the common law of England; because the common law in that regard was then in full force in that State.

"The language of the acts of Congress has not been uniform in the matter of the disposition of the public domain, after the death of the principal beneficiary. Thus under section 2443, in respect of bounty lands granted to officers and soldiers of the Revolutionary War or soldiers of the War of 1812, the patent when applied for by part of the heirs was to be issued in the name of the heirs, generally, and to inure to the benefit of the whole in such portions as they were severally entitled to by the laws of descent in the State or Territory of the decedent's domicile; and other illustrations might be given. *Hutchinson Investment Co. v. Caldwell*, (supra) 1894, 152 U.S. 65, 70.

"[4, 5] There is no right of inheritance involved here. It is a statute that confers recovery upon dependents, not for those who by our standards are legally or morally entitled to support. Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that, under present day conditions, our social attitude warrants a construction different from that of the early English view. The purpose and object of the statute is to continue the support of

[fol. 62] It is not disputed that the subject son was born an illegitimate child and as such was not entitled, under the common law, to receive property as an heir of his father unless under statutory rights. California law on the subject has been changed by Section 255 of the Probate Code to so provide. We quote in the margin.⁷ The referred

dependents after a casualty. To hold that these children or the parents do not come within the terms of the act would be to defeat the purposes of the act. The benefit conferred beyond being for such beneficiaries is for society's welfare in making provision for the support of those who might otherwise become dependent. The rule that a bastard is nullius filius applies only in cases of inheritance. Even in that situation we have made very considerable advances toward giving illegitimates the right of capacity to inherit by admitting them to possess inheritable blood. 2 Kent's Commentaries (12th Ed.) 215." *Middleton v. Luckenbach S. S. Co.*, 2 Cir., 1934, 70 F. 2d 326, 329, 330, certiorari denied, 1934, 293 U.S. 577. See *Civil v. Waterman S. S. Corp.*, 2 Cir., 1954, 217 F. 2d 94, wherein the doctrine of the *Middleton* case was reaffirmed; also *Lawson v. United States*, S.D., N.Y., 1950, 88 F. Supp. 706, 709, wherein the court quotes from *Middleton* with emphasis upon the point of dependency, as in the *Middleton* case. In our case, the illegitimate son is a dependent of the father and mother. See *Tetterton v. Artic Tankers, Inc.*, E.D. Pa., 1953, 116 F. Supp. 429, 432.

⁷ §255. "Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother's kindred, either lineal or col-

to section (255) of the California Probate Code is not a legitimation statute but as the California Appellate court said in *Wong v. Wong Hing Young*, 1947, 80 Cal. App. 2d 391, 394, it is:

... * * * simply a statute of succession. [citing cases]."

Section 230 of the California Civil Code is an out and out legitimation statute, but legitimation under it requires the consent of the wife if the father of the child is married. The father in our case had a wife and there is no allegation or proof that she ever gave her consent to the legitimation of the subject illegitimate child. We quote § 230 in the margin.⁸

[fol. 63] We come then to the definite conclusion that the son Stephen has never been legitimated and that if the right of the renewal of the copyright is accorded only to a legitimate child, the judgment must be affirmed, not upon the ground found by the trial court, to-wit, that the widow is in a preferential class over that of the child, but because the Act does not encompass illegitimate children. We think the judgment cannot be affirmed upon such or any ground.

A most interesting case to consider in connection with this phase of our case is *Estate of Wardell*, 57 Cal. 484, decided in the January 1881 term of the California Supreme Court. The case derives from the fact that a woman failed to mention her illegitimate child in her will. The California law then (and now) authorized a woman to dispose of her property by will and she could cut off any or all of her legal heirs by her will; and it then provided, by

lateral," §255; California Probate Code, enacted, 1931; amended by Stats. 1943, ch. 998, p. 2912. The section recast former §1387 of California Civil Code.

⁸ §230. "Adoption of illegitimate child. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." [Enacted 1872]. Deering (1949) Civil Code of California, §230.

§1307⁹ of the California Civil Code, as quoted in the *Wardell* case, *supra*, at p. 490, that:

“... when any testator omits to provide in his will for any of his *children*, or for the issue of any deceased *child*, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate.” [Emphasis added] (§1307 of California Civil Code, as quoted in the *Wardell* case, *supra*, at p. 490)

It was found in the cited *Wardell* case, *supra*, that such omission by the testatrix did not appear to be intentional, and that “children” as used in the statute included those who would take as her heirs, even if they were illegitimate. [fol. 64] In *Turner v. Metropolitan Life Ins. Co.*, 1943, 56 Cal.App.2d 862, 865, the California Appellate court held that the words “children” in an insurance policy included illegitimate children. After discussing the common law *nullius filii* status of illegitimate children and the later modification of that ancient and harsh doctrine, the court held that the argument of counsel as to limitation upon the meaning of the word “children” would be pertinent if the pending question related to the child’s right to inherit from his father, but that beneficiaries under an insurance policy take by virtue of the contract of insurance rather than by the laws of succession, and that the law of descents and distributions has no applicability to such cases. (See also *Perry v. Manning*, 1952, (Calif.) 241 P.2d 43.) We quote from the *Turner*, *supra*, opinion in the margin.¹⁰

⁹ Enacted 1872; Repealed by Stats. 1931, p. 687, §1700 of California Probate Code. Cf. §90 of California Probate Code, enacted 1931, based on former §§ 1306, 1307, and 1309 of California Civil Code (Deering, 1944), which incorporates generally the repealed section 1307.

¹⁰ “If, therefore, plaintiff’s right of action herein depended upon his right to inherit from his father, the argument advanced by the interveners would be pertinent. But it has been definitely held in this state, as in other jurisdictions, that in such cases as this, involving the rights to

[fol 65] The widow-defendant cites the case of *Louie Wah You v. Nagle*, 9 Cir., 1928, 27 F.2d 573, decided by this court in 1928. The appeal was from an order of the district court quashing a writ of habeas corpus and remanding the appellant to the custody of the immigration authorities. The appellant had alleged and claimed United States citizenship as one born of a United States citizen. The appellant was the illegitimate offspring of a Chinese woman in China and of a man who was a United States citizen. At the rele-

the proceeds of a life insurance policy, the law of contracts and not the law of inheritance is controlling, that beneficiaries under an insurance policy take by virtue of the contract of insurance rather than by the laws of succession, and that the law of descents and distributions has no applicability to such cases. * * * As declared by section 1644 of the Civil Code:

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage in which case the latter must be followed."

* * * and clearly the ordinary and popular sense in which the word child (the singular of children) is understood is as defined in the dictionaries, to-wit: a son or daughter; a male or female in the first degree; the immediate progeny of human parents (Webster's Dictionary); the offspring, male or female, of human parents (Standard and Oxford Dictionaries). No distinction is drawn between legitimate and illegitimate offspring. It is quite true that in the law dictionaries the technical legal definition of 'child' is restricted to conform to the common law definition, that is, to legitimate children, but * * * in construing beneficiary clauses of insurance contracts the technical definitions found in law dictionaries of the different human relationships are not controlling." *Turner v. Metropolitan Life Ins. Co.*, 1943, 56 Cal.App.2d 862, 865.

However, Bouvier's Law Dictionary (Baldwins Student Ed., 1934) defines the word "child" as "The son or daughter, in relation to the father or mother."

yant time there was in effect Section 1993 of Revised Statutes (Title 8 U.S.C. § 6) of the United States which provided in the chapter on "Citizenship", so far as is pertinent here, that:

"All children born out of the jurisdiction of the United States, whose fathers may be citizens of the United States, are declared to be citizens of the United States; (Mar. 2, 1907, c. 2534, §§ 6, 7, 34 Stat. 1229.)

This court affirmed the district court order upon the holding that the term "children" in the statute included legitimate children only under the *nullius filii* doctrine. The statute at that time contained no definition of the word or term "child" or "children". (It may be of some significance to note that the citizenship statute now contains a definition of the term "child" specifically confining the term to legitimate or legitimated children. No such change has ever been made in the Copyright Act.)

The appeal in *Ng Suey Hi v. Weedon*, 9 Cir., 1927, 21 P.2d 801, was of similar import and was decided a year earlier, the same judges sitting. The opinion contains reference to the *nullius filii* doctrine and to the English holding under St. 4 Geo. 11 c. 21, and to the United States State Department's holding that Section 1993 does not exclude legitimated children. The *Louie Wah Yon* case decided, subsequent to the *Ng Suey Hi* case, that unless the appellant had been legitimated by California law, he was not a citizen. Thus, although each of these decisions appears upon its face to be contrary to the basic reasoning that the *nullius filii* doctrine applies only to matters of inheritance, we do not think that doctrine was so squarely considered and met in either case as to require us to hold that it applies in our case under the principle of *stare decisis*.

[fol. 66] The authorities are not all in agreement. However, it cannot be denied that the harsh English common law as to illegitimates has been modified in many, if not all, of the states including the State of California, the residence of all parties here concerned.

We think and hold that since the federal statute providing for renewal of the copyright has nothing to do with in-

heritance or the succession in ownership of property, and actually provides for a new right of property which right is excluded from entering into the status of an inheritance, that there is no reason in the claimed limitation of the meaning of the word "child" or "children" to legitimates in the Copyright Act. And that these words in the Act should be given their ordinary *live-language* meaning in the instant case.

It follows, therefore, that Stephen William Ballentine, although the illegitimate child of George G. DeSylva, the author, and of Marie Ballentine, the plaintiff-mother, and although never legitimated, is, along with the widow of George G. DeSylva, Marie DeSylva (defendant-widow), entitled to a share of the benefits derived and to derive from the copyright renewals made by the surviving spouse, or by the said child, and an accounting should be had for monies had and received.

The prayer of the plaintiff-mother of Stephen William Ballentine for a declaration of rights and for an accounting should be granted, all in accordance with the foregoing opinion.

Reversed and remanded.

[fol. 67] DISSENTING OPINION—August 25, 1955

Before Stephens, Fee and Chambers, Circuit Judges

JAMES ALGER FEE, Circuit Judge, dissenting:

This cause should be remanded to the District Court with direction to dismiss.

There is no diversity of citizenship and no suit for accounting can be entertained in the national courts between citizens of California, without more. Although it is obvious that this is not a suit for infringement, it is urged that there is jurisdiction because it is a civil action arising under an "Act of Congress relating to copyrights."

The acts of Congress which relate to this particular situation provide that a "person may attain registration of [fol. 68] his claim to copyright by complying with the provisions of this title", 15 U.S. C.A. § 11. Plaintiff has not

alleged any compliance with the provisions of the title. She is not, nor is her ward, the author or composer of the works in question. At the outside then, plaintiff claims that Stephen William Ballentine has a right to register as part owner of a renewal of a copyright. The statute in this regard provides: " * * * the widow, * * * or children of the author, if the author be not living, shall be entitled to renewal * * * when application for such renewal shall have been made to the copyright office and duly registered therein." 17 U.S.C.A. § 24. (Emphasis added)

There is no allegation in the complaint that Stephen William Ballentine or anyone in his behalf has applied for registration of renewal or any interest therein to the copyright office. Therefore, no justiciable claim or action arising under an act of Congress relating to copyright is involved or set up.

In the second place, this failure to apply for registration indicates that Stephen William Ballentine or his guardian failed to exhaust his remedies in the administrative field, and therefore, even if there be jurisdiction, no action lies until he has applied for registration of renewal of copyright or an interest in renewal.

The jurisdiction and discretion here is committed to the copyright office, and the court should not interfere until that office has made a determination. The mere fact that plaintiff may fear that the copyright office would not grant an interest in the renewal is no reason to allow her to seek a primary remedy in the courts.

The commitment to the copyright office is positive and exclusive. The same statute provides:

" * * * the register of copyrights * * * shall, under the direction and supervision of the Library of Congress, perform all duties relating to the registry of copyrights." 17 U.S.C.A. § 201.

As noted above, a person may obtain registration by complying with the provisions " * * * and upon such compliance the Register of Copyrights shall issue to him the certificate." 17 U.S.C.A. § 11. Under the very section [fol. 69] under which this claim is now urged in the court, it is provided, when application for such renewal shall

have been made to the copyright office "and duly registered therein", child of the author under appropriate conditions "shall be entitled to renewal." 17 U.S.C.A. § 24.

In *Bouye vs. Twentieth Century Fox*, D.C. Cir., 122 F.2d 51, 53, it is said:

"It seems obvious, also, that the Act establishes a wide range of selection within which discretion must be exercised by the Register in determining what he has no power to accept."

The case just cited expressly holds that such discretion is not uncontrolled, but that the Register is an officer whose acts are subject to judicial review and correction (page 54).

In view of this situation, even if this Court were to reverse the decree and direct that the trial court enter a declaration that plaintiff is entitled to an interest in the copyright, the Register of Copyrights would not necessarily be bound by the determination made in a proceeding where his act was not subject as yet to judicial review. Probably, if Stephen William Ballentine filed an application in accordance with the statute, the Register of Copyrights might refuse to register such a claimed interest irrespective of our direction to hold any accounting. We have heretofore questioned the right of administrative bodies to refuse to follow our opinions. But the cure for that is not to make determination until the administrative process is finished. In such a case, review can be had under the Administrative Procedure Act after final action has been taken. What the guardian is asking is that she win the case before it is commenced.

Mr. Justice Jackson said in *Public Service Commission vs. Wycoff Co.*, 344 U.S. 237, that judicial pronouncements under such circumstances are improper:

"* * * the courts * * * must be alert to avoid imposition upon their jurisdiction through obtaining * * * premature interventions especially in the field of public law." Page 244.

"* * * the declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body. * * * Responsibility for effective functioning of the

[fol. 70] administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts." Page 246.

A clear statement of the situation in which the court would find itself is found in Minneapolis Grain Exchange vs. Farmers Union Grain Terminal Association, 75 F. Supp. 577, 582:

"* * * the decision of this Court will not be final because of certain exclusive powers possessed by the administrative agency, it seems only wise and just, as well as realistic, that this Court should refer the matter to the administrative agency by declining to grant a declaratory judgment."

"The grants of patents and of copyrights stem from the same clause of the Federal Constitution:

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, Sec. 8.

It is obvious that, under the patent section, one can bring an action for infringement. But the writer has never found or heard of any case wherein one claiming to be the joint inventor was allowed to bring suit against the person who had obtained the patent without proceeding in the patent office. Finally, a suit for accounting will not lie, generally speaking, between joint owners of a patent even though their rights have been established by the grant. This is a matter of substantive law. In *Talbott vs. Quaker State Oil Refining Co.*, 3 Cir., 104 F.2d 967, a joint owner of a patent granted license without obtaining consent of his joint owner. It was there held that accounting would not be allowed and that the holding of the state court that one co-owner had licensed the use of the patent to another without consent of the other owner was *res adjudicata* and therefore no suit lay for infringement of the license. It has been held that the granting of a patent to two persons vests each with an undivided half interest, creating the relation of co-tenants between them, so that each becomes

entitled to use the invention without accounting to the other. *Drake vs. Hall*, 7 Cir., 220 Fed. 905, 906; *Blackledge vs. Weir & Craig Mfg. Co.*, 7 Cir., 108 Fed. 71, 76. The same principles had been previously applied specifically to copyrights [fol. 71] in the case of *Carter vs. Bailey*, 64 Maine 458, 463. This last case was tried in the state court.

It would seem that these matters are conclusive upon us and that there was no ground whatsoever of jurisdiction until the statutes had been complied with and the copyright office had either granted or refused registration of the interest of Stephen William Ballentine in the renewals.

Furthermore, it seems that, if the best face is put upon the matter, still the complaint does not state a claim upon which relief can be granted or, as we used to say, there is no cause of action set up. In any event, I think it was an abuse of discretion for the trial court to attempt to give declaratory relief in a field so beset with questions going to the primary right as this. 28 U.S.C.A. Section 400.

The opinion of the majority passes these matters over without consideration. If the direction to the trial court be carried out and an accounting had, this whole series of questions can be raised. Proper administration indicates that, since the administrative process plays such a great part in modern governmental structure, the courts should not encroach upon the severely limited field in which such bodies operate. *Salmon Bay Sand and Gravel Co. vs. Marshall*, 9 Cir., 93 F.2d 1; *O'Leary vs. Dielschneider*, 9 Cir., 204 F.2d 810. But it is a useless gesture to direct the trial court to hold an accounting. After trial is had these questions can all again be raised by either party. There is no security in judgment, even when it has attained apparent finality. Rights should not be declared under Federal Declaratory Judgments Act unless the determination will be of practical help in ending the controversy.

[fol. 72] IN UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 13,880

MARIE BALLENTINE, as Guardian of the Estate of Stephen
William Ballentine, Appellant,

vs.

MARIE DE SYLVA, Appellee

MARIE DE SYLVA, Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen
William Ballentine, Appellee

JUDGMENT—August 25, 1955

Appeals from the United States District Court for the
Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the
Record from the United States District Court for the
Southern District of California, Central Division, and was
duly submitted.

On consideration whereof, It is now here ordered and
adjudged by this Court, that the judgment of the said Dis-
trict Court in this cause be, and hereby is reversed, and that
said cause be, and hereby is remanded to the said District
Court with directions to proceed in accordance with the
opinion of this Court, with costs in this Court in favor of
the appellant Marie Ballentine and against the appellee
Marie DeSylva.

It is further ordered and adjudged by this Court that
the appellant, Marie Ballentine, recover against the appel-
lee, Marie DeSylva, for her costs herein expended and have
execution therefor.

[fol. 73] Clerk's Certificate to foregoing transcript omit-
ted in printing.

[fol. 74] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI.—Filed January 9, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6657-1)

IN THE

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Supreme Court of the United States

HAROLD B. WILLEY, Clerk

October Term, 1955.

LIBRARY

SUPREME COURT, U.S.

No. 529

MARIE DESYLYA,

Petitioner,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen
William Ballentine,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

PAT A. MCCORMICK,

210 West Seventh Street;

Los Angeles 14, California,

Attorney for Petitioner, Marie DeSylva.

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IN THE
Supreme Court of the United States

October Term, 1955.

No.

MARIE DESYLVA,

Petitioner,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen
William Ballentine,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Earl Warren, Chief Justice, and to the
Honorable Associate Justices of the Supreme Court
of the United States.*

Your petitioner, Marie DeSylva, respectfully petitions
this Honorable Court for a writ of certiorari directed to
the United States Court of Appeals for the Ninth Cir-
cuit, to certify the record to this Honorable Court to
review the same, and in respect thereto sets forth as fol-
lows:

Opinions of the Courts Below.*

Ballentine & DeSylva (Op. of the Ct.), F.
2d (App. A);

Ballentine v. DeSylva (Fed. Cir. Judge, dis.)
F. 2d (App. B).

*After printing, there have been added:

Findings of Fact and Conclusions of Law on Summary
Judgment of the United States District Court (App. C).
Judgment of the United States District Court (App. D).

Jurisdiction of This Court.

Petitioner seeks to have this Court review the judgment of the United States Court of Appeals for the Ninth Circuit, dated August 5, 1955, and entered August 25, 1955. No petition for a rehearing of said cause was filed, and no application has been made for an order granting an extension of time within which to petition this court for certiorari.

The jurisdiction of this court is conferred by Title 28, Section 1254, U. S. C. A.

Questions Presented.

1. When the original author is dead, does Title 17, U. S. C. A., Sec. 24, confer the right to renew his statutory copyrights exclusively upon his widow, during her lifetime; or does it confer such rights jointly upon such widow and his child or children, and if so, in what proportions?
2. Does the term "children," as used in Title 17, U. S. C. A., Sec. 24, include an illegitimate child?
3. Did the United States District Court have jurisdiction to hear and determine this action for declaratory relief, with respect to respondent's right of copyright renewal, when respondent failed to exhaust his remedies in the administrative field by registration of renewal of copyright?

Statutes Involved.

Title 17, U. S. C. A., Sec. 24, in so far as the same is pertinent to this case, reads as follows:

"That * * * the author of such work, if still living, or the widow, * * * or children of the author, if the author be not living, or if such author, widow * * * or children be not living, then the author's executors, or in the absence of a will his next of kin shall be entitled to a renewal and extension of the copyright * * *." (July 30, 1947, c. 391, §1, 61 Stat. 652.)

Statement of the Case.

George G. DeSylva, who died July 11, 1950, was an author and composer of musical works, many of which were copyrighted during the last 28 years of his life, and was the owner or part owner of said copyrights. Since his death, a number of copyrights were renewed in the name of Marie DeSylva, his widow and petitioner herein. Other copyrights will, in the future, come up for renewal.

Marie Ballentine, as the mother, and guardian of the estate, of Stephen William Ballentine, respondent herein, filed a complaint in the District Court on August 8, 1952, contending that as the son of George G. DeSylva, Stephen William Ballentine was equally entitled with Marie DeSylva, widow of George G. DeSylva, to the renewals and extensions of said copyrights and prayed for a declaratory judgment and for an accounting. Respondent's complaint did not allege, nor was any proof offered, that he had attempted to register a renewal of any one of his father's copyrights in his name.

Petitioner, on January 7, 1953, filed her answer therein, contending that in accordance with the provisions of Section 24, Title 17, U. S. C. A., relating to the extensions and renewals of copyrights, she, as the widow of George G. DeSylva, is the sole owner of the renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest, and further contended that the said Stephen William Ballentine is not a child of the deceased, George G. DeSylva, within the meaning of Section 24, Title 17, U. S. C. A., and prayed for a declaration of the rights and duties of the respective parties and for a declaration that she is the sole owner of said renewals and extensions of copyrights.

Motions were made by both parties for summary judgment.

It was stipulated between the parties that Stephen William Ballentine is the son of George G. DeSylva, deceased, and of Marie Ballentine, and also that the said George G. DeSylva and Marie Ballentine were not married at the time of the birth of Stephen William Ballentine, or at any other time.

In a judgment entered April 29, 1953, the District Court held that in accordance with Section 24, Title 17, U. S. C. A., so long as petitioner, Marie DeSylva, is alive, she, as the widow of George G. DeSylva, is the sole owner of all rights to renewals and extensions of all copyrights in which George G. DeSylva had an interest and that respondent has no present right to an accounting, nor will have any right to an accounting so long as Marie DeSylva is alive.

Respondent appealed from this judgment.

In its findings of fact and conclusions of law filed in support of this judgment, the District Court found that the respondent herein is "a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to the renewal of copyrights." Petitioner herein appealed from this conclusion.

Both appeals were decided against petitioner in the terms of the decision of the majority of the United States Court of Appeals for the Ninth Circuit. (App. A.)

The basis for jurisdiction in the United States District Court is found in Title 28, U. S. C. A., Section 2201, and Title 17, U. S. C. A., Section 24.

Reasons for Granting the Writ.

1. In this case, the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this court.

That portion of Title 17, U. S. C. A., Section 24, which enumerates those who are entitled to renew a copyright, if the original author be dead, has never been construed by this court. It is important that the rights of widows and children to these valuable properties be clarified and settled.

Most frequently the children of a deceased author will also be the children of his widow, and under such circumstances, ordinarily, no conflict will arise between them as to renewal of copyrights. However, in this day and age, it must be recognized that frequently an author of valuable copyrights will leave surviving him a widow who is not the mother of his surviving child or children by a previous marriage or marriages, and whose interests in renewal rights will be in conflict.

2. The opinion of the Circuit Court of Appeals is incomplete, unclear and confusing in that it simply decides that a child is "entitled to a share of the benefits derived and to be derived from the copyright renewals" (Emphasis added), without deciding the amount of such share.

Let us assume that a deceased copyright holder leaves surviving him a widow and 10 children, legitimate or otherwise. Does the widow acquire the right to 10/20ths of the renewal rights on the deceased author's works and the children each 1/20th? Or, does the widow acquire only a 1/11th interest and each of the children a 1/11th interest? Surely Congress did not intend the latter result, but under the opinion of the Circuit Court of Appeals such could obtain. Even though it be granted that Congress, in delineating the order of succession to rights of renewal, had in mind the protection of those who would be the natural objects of the copyright holders bounty, surely it cannot be said that it was their intention to create a situation which would reduce the widow's right to a possible paucity, and make the quantum thereof dependent upon the number of children, if any, surviving her husband.

3. The opinion of the Court of Appeals in this case is in conflict with the decision of another Court of Appeals on the same matter. In *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909, 911, the Second Circuit Court of Appeals holds that Section 24 of the Copyright Act grants such rights to the persons enumerated therein "in the order of their enumeration." In this statute, "children" are enumerated after "widow, widower," and separated by the disjunctive "or."

In the instant case, the Ninth Circuit Court of Appeals has construed the statute so as to group "widow, widower"

and "children" as a class rather than in the order of their enumeration. In the *Silverman* case, the word "or" is given its plain disjunctive meaning—in the instant case, it is interpreted as meaning "and".

4. The Court of Appeals in this case has decided a federal question in a way in conflict with applicable decisions of this court.

In *McCool v. Smith*, 66 U. S. 218, 221, 1 Black 459 (1861) Mr. Justice Swayne, speaking for the Court, said:

"By the rules of common law, terms of kindred, when used in a statute, include only those who are legitimate unless a different intention is clearly manifested."

In the instant case, the Circuit Court has decided that the word "children," as used in said statute, includes an admittedly illegitimate child. The Court of Appeals itself recognizes the fact that its opinion is in conflict with the opinion of other courts as evidenced by this statement (p. 23).

"The authorities are not all in agreement,"

A reading of the opinion clearly indicates that the majority has construed the language of the statute, as they express it, as giving to the words of the statute "their ordinary live-language meaning," rather than the intention of Congress at the time the statute was passed in 1909. If the statute, as clearly worded, may result in inequities in the light of conditions in 1955, such should be corrected by Congress and not by the courts.

5. The United States District Court was without jurisdiction to hear and determine this action for declaratory relief.

Respondent did not allege in his complaint, nor did he offer any proof, that he at any time had applied for registration of renewal of any copyright owned by his father in the copyright office. By failing so to do, he has failed to exhaust his remedies in the administrative field, and no action will lie until he has applied for registration of renewal of copyrights.

Ballentine v. DeSylva (dissent. op. of Judge Fee)
(App. B).

For which reasons the writ should be granted and the judgment below reversed.

Respectfully submitted,

PAT A. McCORMICK,

Attorney for Petitioner, Marie DeSylva.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, Appellant, vs. Marie DeSylva, Appellee.

Marie DeSylva, Appellant, vs. Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, Appellee. No. 13,880. Aug. 25, 1955.

Appeals from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Fee, and Chambers, Circuit Judges.
Stephens, Circuit Judge.

This litigation began with the filing in the United States District Court of a complaint by Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, a minor, as plaintiff, for declaratory relief against Marie DeSylva, as defendant. The defendant filed motions to dismiss the complaint, to strike therefrom, and for enlargement of time. The district court denied the motion to dismiss, and the other motions seem never to have been acted upon. The defendant answered the complaint, and in the answer herself prayed for a declaratory judgment.

Upon these pleadings, together with an agreed "Statement of Undisputed Facts," "Stipulation *Re* Statement of Facts," and affidavits, the cause was submitted to the district court upon the defendant's motion for a summary judgment over the objection of the plaintiff. The plaintiff also made a motion for summary judgment which was not directly ruled upon. Findings of fact and

conclusions of law, and judgment for defendant followed, to the effect that:

(1) Defendant is the sole owner of all right to renewals and extensions of all copyrights in which George G. DeSylva, now deceased, had an interest.

(2) Plaintiff is not entitled to an accounting.

The plaintiff appealed from the judgment.

The defendant appealed from that part of the judgment, as set out in her notice of appeal, to-wit, wherein said judgment includes and makes a part thereof the following portion of the Conclusions of Law made by the Court herein:

"(2) That Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights."

Neither party makes any point on appeal as to the propriety of the district court's action in submitting the cause for a summary judgment.

In the interest of keeping the parties correctly in mind we shall, throughout this opinion, refer to the plaintiff-appellant and cross-appellee, Marie Ballentine, as the plaintiff or the plaintiff-mother; and to the defendant-appellee and cross-appellant, Marie DeSylva, as the defendant or the defendant-widow.

George G. DeSylva, who died July 14, 1950, was the author of numerous musical compositions which were copyrighted. Marie DeSylva, the defendant, is his surviving widow. Acting under claimed rights as she construed Section 24 of Title 17, United States Code, she applied for and received renewals of certain of the copy-

rights above referred to. Other of the copyrights will, in the future, be subject to renewal.

Marie Ballentine, the plaintiff, is the mother of her ward, Stephen William Ballentine, and George G. DeSylva was his father. The parents were never married. The plaintiff brought the action for a declaratory judgment praying for an adjudication that the child together with the widow as a class, possesses the right to copyright renewals and that the widow, having acted to acquire and having acquired renewals, must account to the child as to benefits received and also account upon future receipts of benefits.

The defendant widow disagrees with the plaintiff mother, and contends that her rights are not in a class with those of the child but are in a preferential class. She also contends that, under the applicable sections of the copyright statute the rights given to "children," as that word is used in the statute, encompass rights to legitimate children only.

The trial judge, in his Findings of Fact and Conclusions of Law, determined that Stephen William Ballentine was the "child" of George G. DeSylva under the applicable section of the copyright law, in conformity with the plaintiff-mother's claim, but construed the copyright statute as providing that the surviving widow, the defendant, has a preferential right over the child. Under such construction, the judgment went for the defendant widow in accordance with her claim that she has the first right and, consistently, no accounting was required.

IS THE WIDOW IN A CLASS WITH THE CHILD?

We turn directly to the statute, Title 17, U. S. C. A. §24, which reads in part:

"That * * * the author of such work, if still living or the widow, * * * or children of the author, if the author be not living, or if such author, widow, * * * or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright * * *." (July 30, 1947, c. 391, §1, 61 Stat. 652.)^{1a}

Without §24, the author's work automatically would enter the public domain upon the expiration of the original copyright term. Under the Act including §24, the original copyright and its ownership, upon expiration of the term of the copyright, is dead; but a new copyright may issue. And it may issue only to and upon application of certain persons who fall into several different categories, as to preference. In this manner the Congress has acted to extend the benefits of the author's work beyond the original copyright term to the author and after his decease to persons who are the natural objects of the author's bounty, and if none, to others under the formula of the Act. The right, sometimes called the renewal right, after the author's death goes directly, and not by inheritance, to indicated members of his family who survive him. If none of the family survives him and there is a will, the right to act goes to the person or persons whom the author has designated as executors. If there is no will and no surviving member of the immediate family,

^{1a}For history of §24, see "Historical Note" following §24 of Title 17, U.S.C.A.

then to the next of kin. The unexercised right itself never goes into a deceased person's estate as property. As to the assignment of expectancy of right of renewal, see *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, S. D. N. Y., 1942, 47 F. Supp. 490; *Carmichael v. Mills Music*, S. D. N. Y., 1954, 121 F. Supp. 43.

It is the logic of the plaintiff-mother that the children of the author are as definitely objects of the author's natural bounty as the widow, and, consistent with the purposes of the Act, that the phrase, "or the widow, * * * or children of the author," does not mean *either the widow or the children*, the one to the exclusion of the other, but means both together as one classification. She supports her contention by pointing out that there is in the Act a qualifying phrase between each of the enumerated classes which are entitled to the right. Thus, the *author* is entitled to the renewal, and then follows the qualifying phrase, "if [he is] still living"; next the *widow or children* are entitled to the renewal, and then follows the qualifying phrase, "if the author be not living." It will be noticed that in the Act there is no qualifying phrase between "widow, * * * or children of the author" to separate the one from the other as separate enumerated classes. By the structure of the Act it would follow that the widow with the children constitute one inseparable class. There is much to commend the logic of this construction. It is not illogical to grant the renewal right to the author, but after his or her decease to the family as a group, mother and children or father and children, for the family's benefit. There is merit in the plaintiff mother's viewpoint that the defendant-widow, who in this case is not the mother of the subject child, is not in a class separate from and exclusive of the author's

children, else there would have been a separating phrase in the Act such as, "or if the widow is not living, then the children."

The mother, acting for and in the interests of the boy, points out that an early draft of the Copyright Act had in it such a qualifying phrase, but that the phrase was dropped in the draft adopted, and she argues therefrom that the Congressional intent was to place the surviving spouse and children in a class together as those first entitled to the renewal of the copyright after the death of the author. She also points to Circular 15 of the Copyright Office,¹ as sustaining the interpretation she con-

¹"The following persons are entitled to claim a renewal copyright:

"1. Aside from the groups of works mentioned in Paragraph 2, below, *renewal copyrights in all works* (including works by individual authors which appeared in periodicals or in cyclopaedic or other composite works), may be claimed by the following groups of persons:

"a. The author of the work, if he is still living at the time when renewal is sought.

"b. *If the author is not living, his widow (or widower), or children may claim renewal.*

"c. If neither the author, his widow (or widower), nor any of his children are living, and the author left a will, the author's executor may claim renewal.

"d. If the author died without leaving a will, and neither his widow (or widower) nor any of his children are living, his next of kin may claim renewal." [Emphasis added] Circular 15 of the Copyright Office, entitled "Instructions for Securing Registration of Claims to Renewal Copyrights" excerpt as quoted by plaintiff-mother (appellant) in her opening brief, p. 9, note 7. .

The above statement is consistent with the letter of Mr. George D. Cary, Principal Legal Advisor to Copyright Office, which letter constitutes note 8 on page 10 of appellant's (plaintiff-mother's) brief. We have not considered this letter, since the record is not clear that it was in evidence. We do not take judicial notice of it.

Both sides concede that there are no decided cases upon the point, and the mother is right in asserting, at page 9 of her opening brief:

tends for. An excerpt from it is quoted in the margin in footnote 1.

Returning to the construction of the Act, we read it as providing for a new right by the renewal of the copyright. First, the author may act under the right. Next, but after the author's death, either the widow or the children are free to act. And it is highly important to observe that the "right" of the renewal never goes into an estate of a decedent. If not acted upon, the right dies. And the possession of the right is provided for in the Act and is not dependent upon or fixed by the law of descent.

"In the absence of direct case authority, the construction [by] those charged with the duty of executing the statute is entitled to persuasive weight and ought not to be overruled without cogent reasons."

See Tennenbaum, Practical Problems in Copyright, CCH Law Handbook—7 Copyright Problems Analyzed (1952), pages 7, 12:

"Whether the widow takes precedence over the children in renewing the copyright has not been adjudicated although this question is constantly troubling the Copyright Bar. The sound and only proper view is that the widow and children are members of the same class, any member of which can apply for the renewal and obtain legal title to the renewal, but he will be deemed a trustee thereof for the other members of the class. If it were the intention to give the widow precedence over the children, the Act would have so stated. The section would then have read, that the widow could renew, if the author is not living, or if neither the author or widow is living, then the renewal should be by the children.

"The injustice of holding otherwise is evident in the case where an author has been married several times, and was survived by children by a prior marriage.

"Could it be said that the Act intended that the wife who was the widow at the death of the author should take the entire renewal to the exclusion of the children by a prior marriage? Where the widow and several children survive, and one child files a renewal, he holds the legal title for himself as trustee for the widow and each of the other children."

See, also, 2 Warner, Radio and Television Rights, 246, Sec. 81; 2 Socolow, The Law of Radio Broadcasting, page 1218. Compare *Silverman v. Sunrise Pictures Corp.*, 1921, 2 Cir., 273 Fed. 909, 912, cert. den. 262 U. S. 758, 43 S. Ct. 705, 67 L. Ed. 1219.

But if we are to assume that the Congress meant to prefer one or the other, which one, the children or the spouse, is preferred? Can it be that the one who acts first gets the prize? We know of no language construction in English or in the law which confers a right over another merely because one is first named in a category of two or more, each of which is separated by a disjunctive. We think the right to the renewal is granted to the class through action by the surviving *spouse or children*.

Here there is not a designation of one over the other, and the word "or" is given its full disjunctive meaning. The Act does not say, as contended by the widow, that upon the author's death the widow may act and if the widow is dead the children may act; it plainly says that *either* may act if the author (husband-father) dies. And it would be entirely out of the beneficent purpose of the Act to construe it as providing that when either acts, the other is cut off. It would seem reasonable to say that if additional words must be added to construe the sentence so as to fit either contention made by the parties, words should be added which best place the Act in implementation of its purposes.

Defendant widow cites the case of *Travers v. Reinhardt*, 1907, 205 U. S. 423, as a case wherein the court, in a situation said to be "in much the same circumstances" as in our case, refused to construe the word "or" as "and," as she argues must be done in our case if the widow with the child constitute one class. The circumstances in the cited case, as it seems to us, were very different from those of our case. In the cited case a testator in a codicil or will used the phrase "without leaving a wife or a child

- 4 -

or children." It was claimed that the testator meant, without leaving a "wife and child." The argument was that the testator intended his real estate to descend through the line of his sons. The court held that it saw nothing in the circumstances to indicate any intention to use the word in any but the disjunctive sense. We do not think the case is persuasive to defendant's point.

And we say the same for another case treated in the brief: *Silverman v. Sunrise Pictures Corp.*, 1921, 2 Cir., 273 F. 909. Therein the court says:

"The purpose * * * is to give to the persons *enumerated* in the order of their *enumeration* * * * a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty." [Emphasis added.]

But the order of *enumeration* is not necessarily the right of the widow over the right of the children for, as pointed out above, the second enumeration would seem to include both as a class with the privilege of *either* widow *or* children to act for both. See *Silverman v. Sunrise Pictures Corp.*, 1921, 273 F. 909. And certainly, both can be properly expectant of the author's bounty, and in many states including California parents are legally liable to support their children.

The defendant widow cites Vol. 18, *Corpus Juris Secundum* 204, wherein it is stated at §79 in the text, that the renewal of the copyright is in:

"* * * the author, if living, or in the author's widow, widower, children, executors, or next of kin, in the ~~order~~ *order* stated * * *." [Emphasis added.]

This text is a carry-over from Vol. 13, Corpus Juris 1090, §239. It will be noticed that the text of the statute is not quoted. The commentator (in Corpus Juris Secundum and in Corpus Juris, *supra*) entirely misses a correct statement which gives rise to the issue in the instant case, by omitting the "or" which, in the statute, is between the words "widower" and "children," and by omitting the word "then" just before referring to "executors." The commentator gives no meaning whatever to the qualifying phrases. The subject sentence reads:

"* * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work * * *" Title 17, U. S. C. A. §24, Copyrights.

It is clear that the commentator followed his preconceived meaning of the Act, rather than the text of the Act. Then, upon such preconceived idea, he completely omits any mention of the fact that there is an intervening qualifying phrase between all of the categories except the category which includes both spouse and children. The absence of the qualifying phrase between "widow, widower" and "or children of the author" indicates, we think, rather plainly that the expression in the Act, "widow, widower, or children of the author," is one inseparable category or enumeration of the several persons who are given the right of renewal. But the commentator by his own boot-straps interpolates his own phrase "in the order stated," citing only *White-Smith Publishing Co. v. Goff*, 1911, 1 Cir., 187 F. 247.

The text in Vol. 34, American Jurisprudence 423, §32, is much the same, though the phrase "in the order named" is not used; however, the expression that the right goes to those "in the order of enumeration" is used. We have hereinbefore treated that expression. There is no decided authority cited.

Margaret Nicholson, in her "A Manual of Copyright Practice" (1945), interpolates, but without analysis or authority, at page 195:

"The publisher may renew the copyright in the name of the widow or widower, *if there is one*; of the child or children, *if there is no widow or widower*
* * *." [Emphasis added.]

No place in the statute is there any such phrase, "*if there is one*," nor is there any such phrase as "*if there is no widow or widower*." These phrases are mere additions to the statute to support the commentator's opinion. There is no showing whatever as to the course of reasoning followed in arriving at such opinion.

To the same effect are the following: "*Risks and Rights in Publishing Television, Radio*," etc., by Samuel Sprigg; "*An Outline of Copyright Law*" (1925), by Richard C. De Wolf; 28 Op. Attys. General 162, Ass't Attorney General Fowler.

We conclude that the word "or" between the words "widower," "children," must be construed as expressing the alternative and means that either one or the other may act for the family which consists of the widow (or widower) and all of the children. See *Pierpont v. Fowle*, 19 Fed. Case No. 11,152.

IS THE ILLEGITIMATE CHILD EXCLUDED FROM ALL RIGHTS UNDER THE RENEWAL PRIVILEGES OF THE COPYRIGHT ACT?

Since we have determined that the right of renewal of the copyright of a deceased author is in the class designated in the Act as "widow, widower, or children," and such renewal is for the benefit of the surviving spouse and children together, we must determine whether in our case the son of the author, having been born outside of wedlock, qualifies as a "child" under the meaning of the Copyright Act. The trial court found, as we have said, that the subject illegitimate child does so qualify. The finding is quoted in the margin.²

In approaching the problem just stated, it will be well to have clearly in mind the fact that the right conferred by the Copyright Act is not a renewal or extension of a property which descends in an estate but is a new, personal grant of a right. Such right is a newly granted and created one, without which or without action under it, the work of the author would enter the public domain.

In both the common law and the civil law, the legal rights and privileges of the child born out of wedlock were severely restricted. He occupied a status in social relation to others tainted with disgrace as the product of

²"IV. That decedent during his lifetime acknowledged in writing that plaintiff, Stephen William Ballentine, was his child; that said acknowledgments were made before witnesses and constitute acknowledgments within the meaning of Section 255 of the Probate Code of the State of California." Findings of Fact and Conclusions of Law on Summary Judgment, Record p. 29. And the trial court made a Conclusion of Law, as follows:

"(2) That Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights." *Ibid.*, p. 32.

shame. As time went on, the harshness accorded the child softened, but has never been completely eliminated. Convention is based upon a phase of common opinion more or less reasonable at a given time, but sometimes persists under the illogic of prejudice long after the reason for it has expired.

Both Blackstone and Kent state that the common law legal restrictions upon illegitimate children are in relation to property inheritance and to qualification to hold church office.⁸

The English law as to property inheritance became a part of the basic law of the United States, but since our Constitution provided for the complete separation of Church and State, the restrictions as to church offices were foreign to our system of government.

Without going into detail as so many opinion writers have done resulting in considerable confusion and inconsistencies, it suffices to say that the very old English law shut out illegitimates from inheriting from either parent, but later the law allowed them to inherit from the mother only. Such was the common law of England and her American colonies, and continued as to the basic American law after Independence. This is not to say, however, that the English common law as of the date of our Independence was from that date static. On the contrary, it continued to change as it had done through the years in its original habitat, to meet the changes in our own civilization. The harshness of one generation may

⁸See Blackstone (1 Bl. Comm., New Ed., 1825) 492; Kent, Commentaries on American Law (11 Ed., 1867), Vol. 2, p. 230; Ayer, Legitimacy and Marriage (1902); 16 Harv. L. Rev. 22, 23.

be tempered in the next by judicial cognizance of material change.

The old English rule was that the illegitimate child is the child of no one, or *quasi nullius filius*, hence is not a child at all where the word "child" or "children" is used in the devolution of real property, except in circumstances showing the opposite intention. If it may continue in this country except where modified by statute, we think there is no occasion to extend its application beyond the original purpose, and courts of both federal and state jurisdiction show a decided trend in that direction.

The old English case of *Wilkinson v. Adams*, 1812, 1 Bes. & Bea. 422, 462, 35 Eng. Rep. 163, 179; is cited by the defendant-appellee widow in our case as authority for the limitation put upon the meaning of the word "child." We have analyzed the argument of counsel in that case which is set out *in extenso* in the report and advisory opinion of three judges; and in the extensive opinion by Lord Eldon. It is held in the latter's opinion that in the construction of a will in relation to real estate, the word "child" (or children) will not be taken to include an illegitimate child unless it can be gleaned from the will itself that such was the intent of the testator. That in case such intent is found, either from direct statement or by reasonable inference, an illegitimate child does not take until and unless it has acquired through "Time and Reputation" an identity as the child of the testator. The case is replete with analyses of precedent cases, several of which reveal that the judges rendered their decisions adverse to the interest of illegitimate children with great reluctance because circumstances outside the wills themselves indicated plainly that the testators meant their

bounty to go to the illegitimate children. In some cases the harsh ruling was avoided through stratagem. It is interesting to note that the opinion of Lord Chancellor Eldon at the outset is specific that the point considered "regards the real estate" as the title is affected by the will. And the Lord Chancellor, in the course of his opinion, states that the limitations as to the *prima facie* meaning of the word "child" derives from Coke, and the citations are solely "Cases of Deeds." Coke, in Co. Lit. 3b. To the same intent is the case of McCool v. Smith, 1861, 66 U. S. 459, 470. A sweeping statement used in the McCool case has had wide quotation, sometimes out of context. The statement is:

"By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate, unless a different intention is clearly manifested."

The statement would be more accurate and would be within the issues of the case it was used in if it had had words limiting it to the statutes referring to title or succession of real property. See Heller v. Teale, 1914, 216 F. 387, 398, citing McCool v. Smith, *supra*.

We think these leading cases are confirmative of the theory that the limitation put upon the word "child" is based upon the importance of land titles and inheriting of land interests, that they are not properly authority for extensions of the doctrine outside the original purpose of the limitation. Since the doctrine arose from consideration of real estate transfers and succession, we see no necessity or legal propriety in holding that Congress intended, in enacting the Copyright Act, to exclude the illegitimate children of the author if the widow survived,

and that such intention cannot be read from the text of the Act.⁴

It is true that it was said in the English case of *Dickinson v. North-Eastern Ry. Co.*, 1863, 9 Law Times Rep. 299, 300 (Pollock, C. B.):

“We have no doubt that in this act of Parliament [Lord Campbell’s Act, 9 & 10 Vict. c. 93], as in all others, the word ‘child’ means ‘legitimate’ child only.”

The cited case appears to be contrary to the theory which we approve, as it extended the limitation to the benefit of recovery of damages.

In *Hutchinson. Investment Co. v. Caldwell*, 1894, 152 U. S. 65, 68, the United States Supreme Court was called upon to construe the federal land preemption law. The decision was that the word “heirs” should be construed not as those who could be heirs at common law but as those who could be heirs in the state in which the land lay. We quote from the Supreme Court’s opinion in the margin.⁵

⁴It will be noted that there is no problem as to the identity of the illegitimate child in the instant case, as it is agreed in the “Statement of Undisputed Facts” by the parties that the child Stephen is the illegitimate child of the author and has been publicly acknowledged by the father-author as such. Record on Appeal, p. 21.

⁵“We are unable to concur with counsel for plaintiffs in error that the intention should be ascribed to Congress of limiting the words ‘heirs of the deceased preemtor’, as used in the section, to persons who would be heirs at common law (children not born in lawful matrimony being therefore excluded) rather than those who might be such according to the *lex rei sitae*, by which, generally speaking, the question of the descent and heirship of real estate is exclusively governed. If such had been the intention, it seems clear that a definition of the word ‘heirs’ would have been given, so as to withdraw patents issued under this section from the operation of the settled rule upon the subject. * * *

“But it is contended that the word ‘heirs’ was used in its common law sense, and it is true that technical legal terms are usually taken,

In the case of *Middleton v. Luckenbach*, S. S. Co., 2 Cir., 1934, 70 F. 2d 326, 329, 330, the issue was whether an illegitimate child could recover for the death of its mother, and whether a mother could recover for the death of an illegitimate child under the Federal Death Act of 1920 (Title 46, U. S. C. A., §761), which provided for damage suits for the benefit of decedent's wife, husband, parent, child, or dependent relative. To the same general effect, see *Campagne Generals Trans-*

in the absence of a countervailing intent, in their established common law signification, but that consideration has no controlling weight in the construction of this statute. Undoubtedly the word 'heirs' was used as meaning, as at common law, those capable of inheriting, but it does not follow that the question as to who possessed that capability was thereby designed to be determined otherwise than by the law of the State which was both the *situs* of the land and the domicile of the owner.

"The object sought to be attained by Congress was that those who would have taken the land on the death of the preemptor, if the patent had issued to him, should still obtain it notwithstanding his death, an object which would be in part defeated by the exclusion of any who would have so taken by the local law if the title had vested in him. * * * If the provision admitted of more than one construction, that one should be adopted which best seems to carry out the purposes of the act. * * *"
Hutchinson Investment Co. v. Caldwell; 1894, 152 U. S. 65, 68, 69.

"There is nothing to the contrary in *McCool v. Smith*, 1 Black, 459 [1861, 66 U. S. 459, 470], which was a case coming to this court from Illinois, in which it was held that the meaning of the words 'next of kin' was to be determined by the common law of England, *because the common law in that regard was then in full force in that State*.

"The language of the acts of Congress has not been uniform in the matter of the disposition of the public domain, after the death of the principal beneficiary. Thus under Section 2443, in respect of bounty lands granted to officers and soldiers of the Revolutionary War or soldiers of the War of 1812, the patent when applied for by part of the heirs was to be issued in the name of the heirs, generally, and to inure to the benefit of the whole in such portions as they were severally entitled to *by the laws of descent in the State or Territory of the decedent's domicile*; and other illustrations might be given. *Hutchinson Investment Co. v. Caldwell* (*supra*), 1894, 152 U. S. 65, 70.

atlantique v. United States, 1948, 78 F. Supp. 797. We quote from the Middleton (*supra*) opinion in the margin.⁶

It is not disputed that the subject son was born an illegitimate child and as such was not entitled, under the common law, to receive property as an heir of his father unless under statutory rights. California law on the subject has been changed by Section 255 of the Probate Code to so provide. We quote in the margin.⁷ The referred to section (255) of the California Probate Code is not a

⁶"[4, 5] There is no right of inheritance involved here. It is a statute that confers recovery upon dependents, not for those who by our standards are legally or morally entitled to support. Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that, under present day conditions, our social attitude warrants a construction different from that of the early English view. The purpose and object of the statute is to continue the support of dependents after a casualty. To hold that these children or the parents do not come within the terms of the act would be to defeat the purposes of the act. The benefit conferred beyond being for such beneficiaries is for society's welfare in making provision for the support of those who might otherwise become dependent. The rule that a bastard is *nullius filius* applies only in cases of inheritance. Even in that situation we have made very considerable advances toward giving illegitimates the right of capacity to inherit by admitting them to possess inheritable blood. 2 Kent's Commentaries, (12th Ed.) 215." Middleton v. Luckenbach S. S. Co., 2 Cir., 1934, 70 F. 2d 326, 329, 330, certiorari denied, 1934, 293 U. S. 577. See Civil v. Waterman S. S. Corp., 2 Cir., 1954, 217 F. 2d 94, wherein the doctrine of the Middleton case was reaffirmed; also Lawson v. United States, S.D. N.Y., 1950, 88 F. Supp. 706, 709, wherein the court quotes from Middleton with emphasis upon the point of dependency, as in the Middleton case. In our case, the illegitimate son is a dependent of the father and mother. See Tetterton v. Artic Tankers, Inc., E. D. Pa., 1953, 116 F. Supp. 429, 432.

⁷§255. "Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does

legitimation statute but, as the California Appellate court said in *Wong v. Wong Hing Young*, 1947, 30 Cal. App. 2d 391, 394, it is:

“* * * simply a statute of succession [citing cases].”

Section 230 of the California Civil Code is an out and out legitimation statute, but legitimation under it requires the consent of the wife if the father of the child is married. The father in our case had a wife and there is no allegation or proof that she ever gave her consent to the legitimation of the subject illegitimate child. We quote §230 in the margin.⁸

We come then to the definite conclusion that the son Stephen, has never been legitimated and that if the right of the renewal of the copyright is accorded only to a legitimate child, the judgment must be affirmed, not upon the ground found by the trial court, to-wit, that the widow is in a preferential class over that of the child, but because the Act does not encompass illegitimate children.

not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother's kindred, either lineal or collateral.” §255, California Probate Code, enacted 1931; amended by Stats. 1943, ch. 998, p. 2912. The section recast former §1387 of California Civil Code.

*§230. “Adoption of illegitimate child: The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption.” [Enacted 1872] Deering (1949) Civil Code of California, §230.

We think the judgment cannot be affirmed upon such or any ground.

A most interesting case to consider in connection with this phase of our case is *Estate of Wardell*, 57 Cal. 484, decided in the January 1881 term of the California Supreme Court. The case derives from the fact that a woman failed to mention her illegitimate child in her will. The California law then (and now) authorized a woman to dispose of her property by will and she could cut off any or all of her legal heirs by her will; and it then provided, by §1307⁹ of the California Civil Code, as quoted in the *Wardell* case, *supra*, at p. 490, that:

“* * * when any testator omits to provide in his will for any of his *children*, or for the issue of any deceased *child*, unless it appears that such omission was intentional, such child, or the issue of such child must have the same share in the estate of the testator as if he had died intestate.” [Emphasis added.] (§1307 of California Civil Code, as quoted in the *Wardell* case, *supra*, at p. 490.)

It was found in the cited *Wardell* case; *supra*, that such omission by the testatrix did not appear to be intentional, and that “children” as used in the statute included those who would take as her heirs, even if they were illegitimate.

In *Turner v. Metropolitan Life Ins. Co.*, 1943, 56 Cal. App. 2d 862, 865, the California Appellate court held that the word “children” in an insurance policy included illegitimate children. After discussing the common law *nullius*

⁹Enacted 1872; Repealed by Stats. 1931, p. 687, §1700 of California Probate Code. Cf. §90 of California Probate Code, enacted 1931, based on former §§ 1306, 1307, and 1309 of California Civil Code (Deering, 1944), which incorporates generally the repealed Section 1307.

fili status of illegitimate children and the later modification of that ancient and harsh doctrine, the court held that the argument of counsel as to limitation upon the meaning of the word "children" would be pertinent if the pending question related to the child's right to inherit from his father, but that beneficiaries under an insurance policy take by virtue of the contract of insurance rather than by the laws of succession, and that the law of descents and distributions has no applicability to such cases. (See also *Perry v. Manning*, 1952 (Calif.), 241 P. 2d 43.) We quote from the *Turner*, *supra*, opinion in the margin.¹⁰

¹⁰"If, therefore, plaintiff's right of action herein depended upon his right to inherit from his father, the argument advanced by the interveners would be pertinent. But it has been definitely held in this state, as in other jurisdictions, that in such cases as this, involving the rights to the proceeds of a life insurance policy, the law of contracts and not the law of inheritance is controlling, that beneficiaries under an insurance policy take by virtue of the contract of insurance rather than by the laws of succession, and that the law of descents and distributions has no applicability to such cases.

* * * As declared by Section 1644 of the Civil Code:

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage in which case the latter must be followed."

* * * and clearly the ordinary and popular sense in which the word child (the singular of children) is understood is as defined in the dictionaries, to-wit: a son or daughter; a male or female in the first degree; the immediate progeny of human parents (Webster's Dictionary); the offspring, male or female, of human parents (Standard and Oxford Dictionaries). No distinction is drawn between legitimate and illegitimate offspring. It is quite true that in the law dictionaries the technical legal definition of "child" is restricted to conform to the common law definition, that is, to legitimate children, but * * * in construing beneficiary clauses of insurance contracts the technical definitions found in law dictionaries of the different human relationships are not controlling." *Turner v. Metropolitan Life Ins. Co.*, 1943, 56 Cal. App. 2d 862, 865.

However, *Bouvier's Law Dictionary* (Baldwin's Student Ed., 1934) defines the word "child" as "The son or daughter, in relation to the father or mother."

The widow-defendant cites the case of *Louie Wah You v. Nagle*, 9 Cir., 1928, 27 F. 2d 573, decided by this court in 1928. The appeal was from an order of the district court quashing a writ of habeas corpus and remanding the appellant to the custody of the immigration authorities. The appellant had alleged and claimed United States citizenship as one born of a United States citizen. The appellant was the illegitimate offspring of a Chinese woman in China and of a man who was a United States citizen. At the relevant time there was in effect Section 1993 of Revised Statutes (Title 8, U. S. C. A., §6) of the United States which provided in the chapter on "Citizenship," so far as is pertinent here, that:

"All children born out of the * * * jurisdiction of the United States, whose fathers may be * * * citizens of the United States, are declared to be citizens of the United States; * * *." (Mar. 2, 1907, c. 2534, §§6, 7, 24 Stat. 1229.)

This court affirmed the district court order upon the holding that the term "children" in the statute included legitimate children only under the *nullius filii* doctrine. The statute at that time contained no definition of the word or term "child" or "children." (It may be of some significance to note that the citizenship statute now contains a definition of the term "child" specifically confining the term to legitimate or legitimated children. No such change has ever been made in the Copyright Act.)

The appeal in *Ng Suey Hii v. Weedin*, 9 Cir., 1927, 21 F. 2d 801, was of similar import and was decided a year earlier, the same judges sitting. The opinion contains reference to the *nullius filii* doctrine and to the English holding under St. 4 Geo. 11 c. 21, and to the United

States Department's holding that Section 1993 does not exclude legitimated children. The Louie Wah You case decided, subsequent to the Ng Suey Hi case, that unless the appellant had been legitimated by California law, he was not a citizen. Thus, although each of these decisions appears upon its face to be contrary to the basic reasoning that the *nullius filii* doctrine applies only to matters of inheritance, we do not think that doctrine was so squarely considered and met in either case as to require us to hold that it applies in our case under the principle of *stare decisis*.

The authorities are not all in agreement. However, it cannot be denied that the harsh English common law as to illegitimates has been modified in many, if not all, of the states including the State of California, the residence of all parties here concerned.

We think and hold that since the federal statute providing for renewal of the copyright has nothing to do with inheritance or the succession in ownership of property, and actually provides for a new right of property which right is excluded from entering into the status of an inheritance, that there is no reason in the claimed limitation of the meaning of the word "child" or "children" to legitimates in the Copyright Act. And that these words in the Act should be given their ordinary live-language meaning in the instant case.

It follows, therefore, that Stephen William Ballentine, although the illegitimate child of George G. DeSylva, the author, and of Marie Ballentine, the plaintiff-mother, and although never legitimated, is, along with the widow of George G. DeSylva, Marie DeSylvia (defendant-widow), entitled to a share of the benefits derived and to derive

from the copyright renewals made by the surviving spouse, or by the said child, and an accounting should be had for monies had and received.

The prayer of the plaintiff-mother of Stephen William Ballentine for a declaration of rights and for an accounting should be granted, all in accordance with the foregoing opinion.

Reversed and remanded.

(Endorsed:) Opinion. Filed Aug. 5. 1955.

Paul P. O'Brien, Clerk.

APPENDIX "B."

Opinion of the United States Court of Appeals for the Ninth Circuit.

Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, Appellant, vs. Marie DeSylva, Appellee.

Marie DeSylva, Appellant, vs. Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, Appellee. No. 13,880. Aug. 25, 1955.

Appeals from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS, FEE, and CHAMBERS; Circuit Judges. JAMES ALGER FEE, Circuit Judge, dissenting:

This cause should be remanded to the District Court with direction to dismiss.

There is no diversity of citizenship and no suit for accounting can be entertained in the national courts between citizens of California, without more. Although it is obvious that this is not a suit for infringement, it is urged that there is jurisdiction because it is a civil action arising under an "Act of Congress relating to copyrights."

The acts of Congress which relate to this particular situation provide that a "person may attain registration of his claim to copyright with the provisions of this title," 17 U. S. C. A. §11. Plaintiff has not alleged any compliance with the provisions of the title. She is not, nor is her ward, the author or composer of the works in question. At the outside then, plaintiff claims that Stephen William Ballentine has a right to register as part owner of a renewal of a copyright. The statute in this regard provides: "* * * the widow, * * * or children of the author,

if the author be not living, shall be entitled to renewal * * * *when application for such renewal shall have been made to the copyright office and duly registered therein.*" 17 U. S. C. A. §24. (Emphasis added.)

There is no allegation in the complaint that Stephen William Ballentine or anyone in his behalf has applied for registration of renewal or any interest therein to the copyright office. Therefore, no justiciable claim or action arising under an act of Congress relating to copyright is involved or set up.

In the second place, this failure to apply for registration indicates that Stephen William Ballentine or his guardian failed to exhaust his remedies in the administrative field, and therefore, even if there be jurisdiction, no action lies until he has applied for registration of removal of copyright or an interest in renewal.

The jurisdiction and discretion here is committed to the copyright office, and the court should not interfere until these appeals have made a determination. The mere fact that plaintiff may fear that the copyright office would not grant an interest in the renewal is no reason to allow her to seek a primary remedy in the courts.

The commitment to the copyright office is positive and exclusive. The same statute provides:

"* * * the register of copyrights * * * shall, under the direction and supervision of the Library of Congress, perform all duties relating to the registry of copyrights." 17 U. S. C. A. §201.

As noted above, a person may obtain registration by complying with the provisions "* * *" and upon such compliance the Register of Copyrights shall issue to him the certificate." 17 U. S. C. A. §11. Under the very section

under which this claim is now urged in the court, it is provided, when application for such renewal shall have been made to the copyright office "and duly registered therein," a child of the author under appropriate conditions "shall be entitled to renewal." 17 U. S. C. A. §24.

In *Bouve v. Twentieth Century Fox*, D.C. Cir., 122 F. 2d 515, it is said:

"It seems obvious, also, that the Act establishes a wide range of selection within which discretion must be exercised by the Register in determining what he has no power to accept."

The case just cited expressly holds that such discretion is not uncontrolled, but that the Register is an officer whose acts are subject to judicial review and correction (page 54).

In view of this situation, even if this Court were to reverse the decree and direct that the trial court enter a declaration that plaintiff is entitled to an interest in the copyright, the Register of Copyrights would not necessarily be bound by the determination made in a proceeding where his act was not subject as yet to judicial review. Probably, if Stephen William Ballentine filed an application in accordance with the statute, the Register of Copyrights might refuse to register such a claimed interest irrespective of our direction to hold any accounting. We have heretofore questioned the right of administrative bodies to refuse to follow our opinions. But the cure for that is not to make determination until the administrative process is finished. In such a case, review can be had under the Administrative Procedure Act after final action has been taken. What the guardian is asking is that she win the case before it is commenced.

Mr. Justice Jackson said in *Public Service Commission v. Wycoff Co.*, 344 U. S. 237, that judicial pronouncements under such circumstances are improper:

"* * * the courts * * * must be alert to avoid imposition upon their jurisdiction through obtaining * * * premature interventions especially in the field of public law." Page 244.

"* * * the declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body. * * * Responsibility for effective functioning of the administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts." Page 246.

A clear statement of the situation in which the court would find itself is found in *Minneapolis Grain Exchange v. Farmers Union Grain Terminal Association*, 75 F. Supp. 577, 582:

"* * * the decision of this Court will not be final because of certain exclusive powers possessed by the administrative agency, it seems only wise and just, as well as realistic, that this Court should refer the matter to the administrative agency by declining to grant a declaratory judgment."

The grants of patents and of copyrights stem from the same clause of the Federal Constitution:

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, Sec. 8.

It is obvious that, under the patent section, one can bring an action for infringement. But the writer has never found or heard of any case wherein one claiming to be the

joint inventor was allowed to bring suit against the person who had obtained the patent without proceeding in the patent office. Finally, a suit for accounting will not lie, generally speaking, between joint owners of a patent even though their rights have been established by the grant. This is a matter of substantive law. In *Talbott v. Quaker-State Oil Refining Co.*, 3 Cir., 104 F. 2d 967, a joint owner of a patent granted license without obtaining consent of his joint owner. It was there held that accounting would not be allowed and that the holding of the state court that one co-owner had licensed the use of the patent to another without consent of the other owner was *res adjudicata* and therefore no suit lay for infringement of the license. It has been held that the granting of a patent to two persons vests each with an undivided half interest, creating the relation of co-tenants between them, so that each becomes entitled to use the invention without accounting to the other. *Drake v. Hall*, 7 Cir., 220 Fed. 903, 906; *Blackledge v. Weir & Craig Mfg. Co.*, 7 Cir., 108 Fed. 71, 76. The same principles had been previously applied specifically to copyrights in the case of *Carter v. Bailey*, 64 Maine 458, 463. This last case was tried in the state court.

It would seem that these matters are conclusive upon us and that there was no ground whatsoever of jurisdiction until the statutes had been complied with and the copyright office had either granted or refused registration of the interest of Stephen William Ballentine in the renewals.

Furthermore, it seems that, if the best face is put upon the matter, still the complaint does not state a claim upon which relief can be granted or, as we used to say, there is no cause of action set up. In any event, I think it was an abuse of discretion for the trial court to attempt to give

declaratory relief in a field so beset with questions going to the primary right as this. Judicial Code, 274d, 28 U. S. C. A. §400.

The opinion of the majority passes these matters over without consideration. If the direction to the trial court be carried out and an accounting had, this whole series of questions can be raised. Proper administration indicates that, since the administrative process plays such a great part in modern governmental structure, the courts should not encroach upon the severely limited field in which such bodies operate. *Salmon Bay Sand and Gravel Co. v. Marshall*, 9 Cir., 93 F. 2d 1; *O'Leary v. Dielschneider*, 9 Cir., 204 F. 2d 810. But it is a useless gesture to direct the trial court to hold an accounting. After trial is had, these questions can all again be raised by either party. There is no security in judgment, even when it has attained apparent finality. Rights should not be declared under Federal Declaratory Judgments Act unless the determination will be of practical help in ending the controversy.

(Endorsed): Dissenting Opinion. Filed Aug. 25, 1955.

Paul P. O'Brien, Clerk.

APPENDIX "C."

In the United States District Court in and for the Southern District of California, Central Division.

Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, Plaintiff, v. Marie DeSylva, Defendant. No. 14,400-T.

Filed Apr. 29, 1953.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON SUMMARY JUDGMENT.

The above entitled cause came on regularly for hearing on the 10th and 14th days of April, 1953, before the Honorable Ernest A. Tolin, Judge presiding, on defendant's motion for summary judgment, Fink, Levinthal & Kent, by Leon E. Kent, appearing as counsel for plaintiff, and Pat A. McCormick and Patrick D. Horgan, b. Pat A. McCormick, appearing as counsel for defendant, and the Court having examined the documents and proofs offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises, now makes its Findings of Fact as follows:

FINDINGS OF FACT.

I.

George G. DeSylva was the owner of many musical works on which he obtained copyrights in his lifetime; and said George G. DeSylva died July 11, 1950. Defendant Marie DeSylva is the widow of said decedent.

II.

Plaintiff, Stephen William Ballentine, also known as Stephen William Moskovita, is the son of George G. DeSylva and was born on March 10, 1944.

III.

That Marie Ballentine is the mother of said child and that decedent and said Marie Ballentine were not husband and wife at the times of the conception and birth of the said child.

IV.

That decedent during his lifetime acknowledged in writing that plaintiff, Stephen William Ballentine, was his child; that said acknowledgments were made before witnesses and constitute acknowledgments within the meaning of Section 255 of the Probate Code of the State of California.

V.

That since the death of the decedent a number of copyrights taken out in his name have been renewed in the name of defendant. That in the future, the balance of the copyrights of decedent's musical works, written within the last twenty-eight years of decedent's life, will come up for renewal.

VI.

That demand has been made upon defendant by plaintiff for an accounting of moneys and benefits derived by defendant as a result of said renewals in defendant's name; that said demand has been refused by defendant.

VII.

That an actual and bona fide dispute has arisen between plaintiff and defendant with respect to their respective rights in the musical works copyrighted during the last twenty-eight years of decedent's life.

VIII.

That an accounting by defendant with respect to the copyrights and renewals thereof on decedent's musical

compositions, as well as moneys received therefrom, is not necessary.

IX.

That the defendant is the sole owner of the right to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest.

CONCLUSIONS OF LAW.

From the foregoing facts, the Court makes its Conclusions of Law as follows:

That defendant is entitled to judgment herein as follows:

(1) That it be declared, determined and adjudged by this Court that, in accordance with Section 24 of Title 17, United States Code, so long as defendant Marie DeSylva is alive, said defendant is the sole owner of all right to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest.

(2) That Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights.

(3) That the plaintiff herein has no right to an accounting from defendant for moneys or benefits obtained as a result of renewals and extensions of copyrights obtained by defendants, nor is plaintiff entitled to an accounting as to any such renewals or extensions of copyrights in the future so long as said defendant is alive.

(4) That defendant is entitled to judgment for costs and disbursements incurred or expended herein.

Let Judgment Be Entered Accordingly.

Dated this 29th day of April, 1953.

ERNEST A. TOLIN,

United States District Judge.

APPENDIX "D."

In the United States District Court in and for the Southern District of California, Central Division.

Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, Plaintiff, v. Marie DeSylva, Defendant. No. 14,400-T.

Filed Apr. 29, 1953.

JUDGMENT.

The above entitled cause came on regularly for hearing on the 10th and 14th days of April, 1953, before the Honorable Ernest A. Tolin, Judge presiding, on defendant's motion for summary judgment, Fink, Levinthal & Kent, by Leon E. Kent, appearing as counsel for plaintiff, and Pat A. McCormick and Patrick D. Horgan, by Pat A. McCormick, appearing as counsel for defendant, and the Court having examined the documents and proof offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law on Summary Judgment, and having directed that judgment be entered in accordance therewith:

Now, Therefore, by reason of the law and findings aforesaid,

It Is Hereby Ordered, Adjudged and Decreed:

1. That, in accordance with Section 24 of Title 17, United States Code, so long as defendant Marie DeSylva is alive, said defendant is the sole owner of all right to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest;

2. That the plaintiff herein has no right to an accounting from defendant for moneys or benefits obtained as a result of renewals and extensions of copyrights obtained by defendant, nor is plaintiff entitled to an accounting as to any such renewals or extensions of copyrights in the future so long as said defendant is alive;

3. That defendant is awarded her costs and disbursements incurred or expended herein in the sum of \$.....

The Clerk is ordered to enter this Judgment.

Dated: This 29th day of April, 1953.

ERNEST A. TOLIN,

United States District Judge.

Office of the Clerk, U. S.
MAR 18 1956
HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 529

MARIE DESYLVA,

Petitioner,

vs.

MARIE BALLENTINE, as Guardjan of the Estate of
Stephen William Ballentine,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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Of Counsel.

Dated: March 6, 1956

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1955

MARIE DESYLVIA,
Petitioner,

vs.

MARIE BALLENTINE, as Guardian of the
Estate of Stephen William Ballentine,
Respondent.

No. 529

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the district court (R. 29-32) is not reported. The majority opinion (R. 47-67) of the United States Court of Appeals for the Ninth Circuit is reported at 226 F. 2d 623 and dissenting opinion (R. 67-71) of Judge Fee therein is reported at 226 F. 2d 634.

JURISDICTION .

The judgment of the district court in favor of defendant (petitioner herein) and against plaintiff, was entered on April 29, 1953 (R. 33-34). The judgment of the United States Court of Appeals, Ninth Circuit, reversing the judgment of the district court, was entered August 25, 1955 (R. 72). No petition for rehearing of said cause in that court was filed. Petitioner filed her petition for a writ of certiorari on November 21, 1955, and such petition No. 529 was granted January 9, 1956 (R. 73).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (1952).

STATUTORY PROVISIONS

This case involves the construction of the Copyright Act, 17 U. S. C. § 24 (1952), set forth in Appendix A.

QUESTIONS PRESENTED

1. When the author is dead, does 17 U. S. C. § 24 (1952) confer the renewal and extension of his statutory copyrights accruing during his widow's lifetime, exclusively upon her?

2. Does the term "children", as used in 17 U. S. C. § 24, (1952) include an illegitimate child?

STATEMENT OF THE CASE

George G. DeSylva, who died July 11, 1950, was an author and composer of musical works, many of which were copyrighted during the last 28 years of his life. Since his death, a number of copyrights were renewed in the name of Marie DeSylva, his widow and petitioner herein. Other copyrights will, in the future, come up for renewal (R. 4, 5, 12).

Stephen William Ballentine is the minor illegitimate son of George G. DeSylva and Marie Ballentine, who were not married at the time of his birth or at any other time (R. 20-21). Marie Ballentine, as mother and guardian of the estate of Stephen William Ballentine, filed a complaint in the district court on August 8, 1952, contending that Stephen William Ballentine, as the son of Mr. DeSylva, was equally entitled with the petitioner widow, Marie DeSylva, to the renewals and extension of the copyrights above mentioned. The complaint prayed for a declaratory judgment and an accounting (R. 3-7).

Petitioner, on January 7, 1953, filed her answer therein, contending that in accordance with the provisions of 17 U. S. C. § 24 (1952) relating to the extensions and renewals of copyrights, she, as the widow of George G. DeSylva, is the sole owner of the renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest, and that the said Stephen William Ballentine is not a child of the deceased, George G. DeSylva, within the meaning of 17 U. S. C. § 24 (1952) (R. 12-14).

Motions were made by both parties for summary judgment (R. 14, 24, 25).

In a judgment entered April 29, 1953, the district court held that in accordance with 17 U. S. C. § 24 (1952) so long as petitioner, Marie DeSylva, is alive, she, as the widow of George G. DeSylva, is the sole owner of renewals and extensions of copyrights in which George G. DeSylva had an interest (R. 33-34).

Respondent appealed from this judgment (R. 35).

In its findings of fact and conclusions of law filed in support of this judgment, the district court found that the respondent herein is "a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights" (R. 29-32). Petitioner herein appealed from this conclusion (R. 35).

Both appeals were decided against petitioner in the decision of the United States Court of Appeals for the Ninth Circuit (R. 47-67). Judge Fee dissenting on jurisdictional grounds (R. 67-71).

ARGUMENT

The issues presented by this case will be determined by this Court's judicial interpretation of provisions of the Copyright Act 17 U. S. C. § 24 (1952) which provide:

* * * That * * * the author of such work, if still living, or the widow, widower, or children of the

author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work * * * (Emphasis added)

The court below (R. 47-67) decided that the widow and children of a deceased author share the renewal and extension of the author's copyrights. The opinion is silent as to the apportionment or division of the copyright renewals between widow and children. The court holds further that respondent, admittedly an illegitimate child, is a "child" within the meaning of the statute.

For the reasons hereinafter advanced, petitioner contends that the court below has erroneously decided both issues. The wording of the statute is clear and unambiguous. By its terms, upon the death of the author, his widow is granted the exclusive benefits of copyright renewals during her lifetime and after her death such rights accrue to the children of the author. Further, petitioner contends that Congress did not intend that the illegitimate child should share with legitimate children in the ownership of renewal rights.

POINT I

WHEN THE AUTHOR IS DEAD THE RENEWAL OF A COPYRIGHT BECOMING RENEWABLE DURING HIS WIDOW'S LIFETIME IS EXCLUSIVELY HERS UNDER THE PROVISIONS OF THE COPYRIGHT ACT 17 U. S. C. § 24 (1952)

(1) The court of appeals has erroneously construed the clear, unambiguous and plain meaning of the statute.

We are here concerned with the interpretation of a federal statute, and petitioner asks only that the time-honored rules with respect thereto be followed by this Court. As

stated in *Sturges v. Siegel*, 117 Fed. 13, 18-19 (8th Cir. 1902):

"There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction."

Chief Justice Marshall of this Court warned many years ago of the danger of disregarding "the plain provision" of an instrument, and stated in *Sturges v. Crozeninshield*, 17 U. S. (4 Wheat.) 122, 202 (1819):

"But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

The meaning of the language of the statute in question is clear and unambiguous, and it certainly cannot be said that either absurdity or injustice results from its apparent and plain meaning.

In emphasizing the absence of a "qualifying phrase" (R. 50) between the words "widow * * * or children", the court of appeals has ignored the clear disjunctive "or" that separates them and has failed to realize that such, in its plain ordinary meaning, creates a division and preference within the so-called "family" class. Thus, the phrase in fact is substitutional and gives such rights as are granted therein first to the widow and then to the children. The court of appeals has unnecessarily supplemented the clear wording of the statute by reading into it the word "either" and concluding therefrom that they were giving to "or" as used in the phrase "widow * * * or children" in section 24

its "full disjunctive meaning" (R. 53). In fact the court of appeals did exactly the opposite. Far from giving the phrase its "full disjunctive meaning", the court of appeals in effect rewrote the statute to give that phrase a *conjunctive* meaning, so as to make it read "widow * * * and children".

The court of appeals has erred in construing the "right" conferred under section 24 as the right to "act" (R. 54, 56) or in other words the right to file application for renewal of copyright. The persons named in sequence in section 24, under its clear language, are those persons who are "entitled to a renewal and extension of the copyright". Indeed, to read the sequence or enumeration of section 24 only as a statement of those who may file applications for renewal rather than as those who are entitled to own the renewal and extension of copyright leaves the section without any reference to those who are entitled to own the renewal and extension. It is respectfully submitted that this would be an absurd result.

The copyright law now in force does not prescribe who may file application for renewal of copyright. Section 24 while providing that the person named shall have the renewal copyright "when application for such renewal and extension shall have been made" does not specify those who may file such application. In fact, the application form for renewal of copyright, Form "R", issued by the Copyright Office provides for the enumeration of those claiming the renewal but does not require the signature or name of the person actually filing for such renewal in their behalf.

The inevitable conclusion and result of the court of appeals' decision is, of course, that widow and children share the renewal copyright on the death of the author and share all benefits derived from such renewal.

It is apparent, therefore, that the court below has failed to give the word "or" as used in the statute its plain and ordinary disjunctive meaning and has in effect substituted

therefor the conjunctive "and" to include the widow and children as sharing in the same class.

That the words "widow or children" are intended to create a substitutional gift to the children in the event the widow shall have died is made extraordinarily clear when we look to the construction and interpretation of this phraseology in an analogous situation.

Although section 24 is not strictly a testamentary transfer of the copyright renewal from the author to his or her "widow, widower, or children", it is analogous to a testamentary disposition; and the construction by the courts of similar language in wills is analogous, if not controlling. There can be no doubt that such language contained in a will would by itself result in a construction that the word "or" renders the gift to the children substitutional only and that they would be entitled to receive the renewal right only in the event the widow had predeceased the testator author.

Thus, in *Matter of Lane*, 79 Misc. 71, 140 N. Y. Supp. 602 (Surr. Ct. Kings Co. 1913), the first paragraph of a will, the form of which was reproduced in later provisions, read as follows:

"First. I give and bequeath to Walter A. Lane, or his child, one quarter interest or share, in the house No. 46 Fourth place, in the city of Brooklyn, N. Y."

In holding that the gift to the child in the quoted paragraph, and the gifts to children of the legatees in other similar paragraphs, were substitutional only, the court stated as follows:

"Each of these efforts of the testatrix to make a disposition of her estate must be indulgently regarded, and the first commanding thought is that nobody can sanely doubt that the testatrix meant to make gifts in each case to a parent if he survived her and to his child or children if he did not so survive. Language which would be understood by all man-

kind to be adequate to a given result must not only be taken to represent a subjective purpose in the mind of the testator but must be considered as a sufficient record of such purpose."

Similarly, in *Bender v. Bender*, 226 Pa. 607, 75 Atl. 859 (1910), a decedent in his will left a "House and lot to go to Johannes Bender or his children." The lower court held that the word "or" should be read as "and" and granted to Johannes only a life estate in the property. In reversing this judgment and holding that Johannes Bender received a fee simple in the property and that his children would have been entitled to the property only in the event that Johannes Bender had predeceased the testator, the court stated as follows:

"Were the devise uncertain because of ambiguity in some of the words used, it is quite possible that sufficient could be found in other parts of the will to resolve the doubt; but entirely intelligible and complete in itself, no borrowed light is needed for any purpose in connection with it. * * * The simplest form of a substitutional gift is effected by the use of the word "or" which is usually construed as implying substitution."

In stating the circumstances that must exist before words will not be given their ordinary and understandable meaning, this same court stated (p. 861):

"We do not say that the change may not be proper in any such case; but the reasons justifying it must not only be found in other parts of the will, but they must be *positively compelling to the common understanding.*" (Emphasis added)

Such rule that a testamentary gift in form to a person *nominatim* "or his children" results in a construction that the children have a gift only by substitution in the event of the death of the named person prior to the death of the testator appears to have been established in England at an

early date, *Penley v. Penley*, 12 Beav. 547, 50 Eng. Rep. 1170 (1850); and is well settled throughout the various jurisdictions in this country, *Tate v. Amos*, 197 N. C. 159, 147 S. E. 809 (1929); *Schaeffer's Adm'r v. Schaeffer's Adm'r*, 54 W. Va. 681, 46 S. E. 150 (1903); *Carlin v. Helm*, 331 Ill. 213, 162 N. E. 873 (1928); *Rolf's & Leising's Guardian v. Frischolz's Exr.*, 251 Ky. 450, 65 S. W. 2d 473 (1933); *Mead v. Close*, 115 Conn. 443, 161 Atl. 799 (1932).

(2) Petitioner's interpretation of the statute has been accepted by the courts, the commentators and the various industries dealing with copyrightable matter.

It has been assumed universally that the widow is first entitled to the renewal and extension of copyrights of her deceased husband-author, and, since 1870 when the language "widow or children" first appeared in our copyright law (Act of July 8, 1870, c. 230, § 88, 16 Stat. 212) no case has arisen, until now, in which the meaning of these words has been questioned.

As is forcibly demonstrated in the briefs filed herein by amici curiae, the various industries dealing with copyrightable matter have, without exception, construed the Act as granting the renewal copyright exclusively to the widow during her lifetime, and acting thereon have negotiated for, and acquired, rights of renewal from widows exclusive of children.

In this connection this Court in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U. S. 643, 657-658 (1943) in finding that renewal interests are assignable was " * * * fortified in this conclusion by reference to the actual practices of authors and publishers with respect to assignments of renewals * * *".

Of particular bearing and significance to the issue herein discussed is Mr. Justice Frankfurter's statement in *Fred*

Fisher Music Co. v. M. Witmark & Sons, supra, 646 n. 2 as follows:

"Ball and Olcott were no longer living at the time, and under § 23[*] of the Act *their interests in the renewal passed to their widows.*" (Emphasis added)

The order of succession to the copyright renewal is also set forth in *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909, 911 (2d Cir. 1921), *cert. denied*, 262 U. S. 758 (1923), where it is stated:

"The purpose of the statutory renewal provisions is to give to the persons enumerated in the order of their enumeration a new right or estate, * * *"
(Emphasis added)

It is clear that in the order of their enumeration, the widow separated by the disjunctive "or" takes preference over the children.

The commentators generally considered as authorities are agreed that the widow takes precedence over the children.

Shortly after the enactment of the 1909 Copyright Act, Assistant Attorney General Fowler rendered an opinion on the succession of the renewal copyright stating in part:

"* * * and the third section mentioned, the one here applicable, required the extension or renewal to be procured by the author, if living, or if dead, by the persons, and in the order, mentioned in the preceding section, * * *." 28 Ops. Atty. Gen. 162, 165 (1910).
(Emphasis added)

Similarly Richard C. DeWolf, who was an attorney in the Copyright Office when the 1909 Act was enacted, commented in respect of the renewal right as follows:

[*] The former § 23 referred to by Mr. Justice Frankfurter in the footnote to his opinion became § 24 by the Act of July 30, 1947, c. 391 § 1, 61 Stat. 652.

"The renewal can only be obtained by the beneficiaries expressly named in the law, and by them in the order named, i.e., the person having the first right is the author, if living at the end of the original term; if he is not living, then the widow or widower, is entitled to renew; if there is no widow or widower, the children come in; * * *." *An Outline of Copyright Law* 66 (1925)

Corpus Juris comments as follows:

"In all other cases the right of renewal of such subsisting copyrights is in the author, if living, or in the author's widow, widower, children, executors, or next of kin, in the order stated, 'If the author be dead.'" 13 C. J., *Copyright and Literary Property* § 239 (1917) (Emphasis added).

American Jurisprudence is to the same effect:

"The purpose of the renewal provision in the copyright statute is to give to the persons enumerated, in the order of enumeration, a new right or estate * * *." 34 Am. Jur., *Literary Property and Copyright* § 32 (1941) (Emphasis added).

Margaret Nicholson in her *A Manual of Copyright Practice* (1945), at page 195, 196 states:

"The publisher may renew the copyright in the name of the widow or widower, if there is one; of the child or children, if there is no widow or widower; * * *." (Emphasis added)

Similarly Samuel Spring, in *Risks and Rights in Publishing, Television, Radio, Motion Pictures, Advertising, and the Theater* (1952), at page 94 states:

"The Succession of these successive classes of holders to the exclusive right to renew is rigidly enforced. Each holder succeeds to his right of renewal in strict order of priority. Thus an author's children cannot renew the term if the author's widow be living; * * *."

(3) The legislative history supports petitioner's contention.

The court below places some emphasis on the fact that an early draft of the Copyright Act, in naming those entitled to renew, used the words "or in her default or if no widow survive him by his children" (R. 51). From the absence of this language in the 1909 Act, the inference is drawn that it was the intention of Congress that the widow and children were in an inseparable class and shared the renewal copyright. Such an inference is not warranted. If it were the intent of Congress that widow *and* children should share the renewal copyright this could easily have been accomplished by the simple substitution of the conjunctive "and" for the disjunctive "or". In fact the "early draft" (R. 51) referred to by the court of appeals is part of an unenacted bill, H. R. 19853, 59th Cong., 1st Sess. (1906), the substance of which with respect to terms of copyright was completely discarded with the adoption of the 1909 Act. It is clear, therefore, that Congress in enacting a new Copyright Act in 1909 adopted and continued the clear language of the 1870 Act, namely "widow or children", inserting only the word "widower" so that the phrase now reads "widow, widower, or children", which modification, of course, does not in the slightest change the clear meaning of the disjunctive "or" as used in both statutes. If any inference is to be drawn from the rejection of this "early draft", it is that the language as finally adopted better and more succinctly expressed the congressional intent.

Reference to the history of the Act lends support to petitioner's argument.

Copyright legislation was first enacted by Congress in 1790 and the renewal copyright was then confined to the original author and his " * * * executors, administrators or assigns * * * ". (Act of May 31, 1790, c. 15, § 1, 1 Stat. 124) Thus the renewal right was treated like any other

property and was subject to testamentary disposition by the author without restriction.

In 1831 the Copyright Law was changed and the renewal copyright was then dealt with as follows:

"* * * That if, at the expiration of the aforesaid term of years, such author, * * * being dead, shall have left a widow, or child, or children, *either or all then living*, the same exclusive right shall be continued to such author, designer, or engraver, or, if dead, then to such *widow and child, or children*, for the further term of fourteen years: * * *" Act of February 3, 1831, c. 16, § 2, 4 Stat. 436. (Emphasis added)

It is clear that in 1831 Congress intended that the widow *and* children of a deceased author should share the renewal term of copyright and accomplished that purpose by use of the conjunctive "and".

The 1831 renewal provision remained unchanged until the Act of July 8, 1870, c. 230, § 88, 16 Stat. 212, which provided:

"* * * That the author, inventor, or designer, if he be still living, and a citizen of the United States or resident therein, or his *widow or children*, if he be dead, shall have the same exclusive right continued for the further term of fourteen years * * *" (Emphasis added).

The substitution of the disjunctive "or" for the conjunctive "and", together with the omission of the phrase "either or all then living", cannot be interpreted as a mere matter of chance.

The use of the word "and" plus the phrase "*either or all then living*" indicates a grant of the renewal right to those persons then living *as a class*. The 1870 Act which dropped the words "*either or all then living*" and changed the conjunctive "and" to the disjunctive "or" constitutes a substitutional grant to the widow, or if there be no widow

them to the children. The 1909 Act, which still is in effect, continues the use of the disjunctive "or".

- (4) To grant the right to renewal and extension of copyrights first to the widow and upon her death to the children is in accord with the intention of Congress in this and other fields of legislation.

To prefer the author's widow in the granting of renewal rights in most cases is consistent with the wishes of the author, the creator of those rights. Normally the widow of an author is the mother of his surviving children and their interests are compatible. If the children are minors it is essential that she have the exclusive and unrestricted ownership of the renewal rights of her deceased husband's copyrights so that she may better provide as the surviving head of the family. In fact as stated in the opinion of the court below (R. 54):

"* * * and in many states including California parents are legally liable to support their children."

Accordingly granting preference to the widow with respect to the renewal copyright does not mean that the children are excluded from the "author's bounty" and upon the death of the widow the renewal copyright becomes the property of the children. Surely Congress had the normal situation in mind, rather than the unusual and exceptional case such as the one presented here.

The opinion of the court below seems to be based on the unwarranted fear that a mother will disinherit her worthy children or an unworthy stepmother will profit at the expense of the author's children by a previous marriage. It is respectfully submitted that such cases are few and no statute can be drawn as to, in all cases, avoid occasional hardship.

It is not unusual for statutes, both federal and state, to prefer a widow as against the children of a deceased husband in the apportionment or allocation of property rights originating with the husband.

For example, under 28 Stat. 964 (1895), 38 U. S. C. § 96 (1952) a federal pensioner's accrued pension " * * * shall inure to the sole and exclusive benefit of the widow or children", with the widow taking to the exclusion of the children if she be living at the death of the pensioner.

Widows of Army or Air Force officers receive an allowance to the exclusion of a child or children on the death of such officer, 41 Stat. 367 (1919), 10 U. S. C. § 903 (1952).

If the person making the original entry upon public lands be dead, his widow is preferred in completing and perfecting such entry, 37 Stat. 123 (1912), 43 U. S. C. § 164 (1952).

- (5) **The opinion and judgment of the court below destroys the intended meaning of the statute and the rights created thereunder.**

The only construction of section 24 of the 1909 Act that gives it clarity and meaning is that which gives the whole and exclusive renewal and extension of copyright to the widow during her lifetime. To adopt the construction of the court below leaves entirely unanswerable the vital question: How much does the widow take and how much the children? The learned judges below have completely failed to consider this question and after deciding that the widow and children are to share these rights as a class, they have left the division of such rights to speculation and conjecture. If their judgment is to hold, does the widow take one half and the children the other half? Or are these rights to be divided per capita between the widow and children? Certainly it was not intended that the quantum of the widow's share should depend upon the number of children, with the possibility of her share being reduced to a paucity. The clear language of the statute contemplates no such strained interpretation as rendered by the court of appeals.

It is respectfully submitted that for any court to attempt to spell out the shares of the renewal copyright a widow and

children shall take in all situations would amount to nothing less than judicial usurpation of the legislative powers reserved to Congress by the Constitution, U. S. Const. art. I § 1.

The interpretation of this statute as contended for by petitioner, gives to the statute clarity of meaning and completeness and lends logic and persuasion to its adoption by this Court.

POINT II.

AN ILLEGITIMATE CHILD IS NOT A "CHILD" WITHIN THE MEANING OF THE COPYRIGHT ACT 17 U. S. C. § 24 (1952)

Petitioner contests the finding of the court of appeals that respondent, admittedly illegitimate, is a child within the meaning of the renewal provisions of the Copyright Act. It is important at this point to clarify the status of respondent's ward Stephen William Ballentine. Pursuant to stipulation (R. 20-21) Stephen William Ballentine is the son of George G. DeSylva, deceased, and Marie Ballentine, born out of wedlock. He was an heir of his father within the meaning of section 255 of the Probate Code of the State of California (App. B), but was never legitimated under the provisions of section 230 of the California Civil Code (App. C).

Under section 255, an illegitimate child is declared to be an heir of his mother and of his father if such father acknowledges him or adopts him into his family. Section 230 of the Civil Code provides for legitimation for all purposes of an otherwise illegitimate child by his father and his father's wife *with her consent*.

Stephen William Ballentine was acknowledged by George G. DeSylva during his lifetime so as to bring him within the provisions of section 255; but as the court of appeals points out, there is no allegation or proof sufficient

to bring Stephen William Ballentine within the meaning of section 230 of the Civil Code (R. 63). Thus, it has been clearly established that the respondent's ward for the purposes of this discussion is to be considered an illegitimate child.

It is the position of petitioner that both under the English common law as adopted by our several states and under American statutes, federal and state, the words "child" or "children" mean only a legitimate child or children unless otherwise expressly stated. Further, that under section 24 of the Copyright Act the word "children" as used therein refers only to legitimate children, and that therefor respondent's ward is not a person included in the provisions of that Act.

At common law, an illegitimate child meant *filius nullius*, the child of nobody, or *filius populi*, a child of the public. Such a child had no father known to the law and indeed not even a mother. (See 7 Am. Jur. *Bastards* § 3 (1937)) So deeply entrenched in the common law was this concept that in a suit brought by an illegitimate child against a railway company for damages for his father's death, under Lord Campbell's Act, the court held that the word "child" in the Act did not include the plaintiff illegitimate. *Dickinson v. North-Eastern Railway Company*, 9 L. T. R. (n. s.) 299 (1863).

We believe the controlling authority in this Court on this subject is *McCool v. Smith*, 66 U. S. 459, 470 (1861), in which Mr. Justice Swayne said:

"By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate, unless a different intention is clearly manifested. This is conceded by the counsel for the defendant in error. The proposition is too clear to require either argument or authority to sustain it."

A case of more recent origin, evidenced by *Louie Wah You v. Nagle*, 27 F. 2d 573 (9th Cir. 1928) is particularly close to the case in hand in that it directly is concerned with construction of a United States statute. In that case the appeal was from an order of the United States District Court quashing a writ of habeas corpus, and in it the appellant claimed United States citizenship as a person born of a United States citizen. The appellant was the illegitimate offspring of a Chinese woman, born in China and of a man who was admittedly a United States citizen. At that time Rev. Stat. § 1993 (1875) provided:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be * * * citizens thereof are declared to be citizens of the United States; * * *."

The court of appeals held that the appellant because he was admittedly illegitimate was not included in the term "children" as used in the statute and therefore not entitled to his citizenship. Thus, here is a case concerned with a United States statute enacted in 1907 which creates a statutory right (that of citizenship), which uses the word "children" and which unequivocally refused to extend the use or meaning of that term so as to include an illegitimate child. See also *Ng Suey Hi v. Weedin*, 21 F. 2d 801 (9th Cir. 1927).

Manifestly there is nothing in the nature of the right to the copyright renewal that makes it different or more valuable than the cherished right of citizenship so as to grant one to the illegitimate and deny him the other. As recently as 1952 Congress recognized the distinction between legitimate and illegitimate children with the adoption of the Act of June 27, 1952 (66 Stat. 238; 8 U. S. C. § 1409 (1952)) which provides that children born out of wedlock and outside of the United States and its possessions may acquire citizenship only if paternity is established by legiti-

mation. Clearly this statute denies the right to citizenship to an illegitimate child born outside of the United States and its possessions of a parent who is a citizen, whereas the legitimate child born outside of the United States and its possessions of a parent who is a citizen is automatically granted such right.

We believe that a fair review of all statutes, federal and state alike, and the opinions of the courts on the subject as well, leads to the conclusion that at the present time, illegitimate children are still under historical restrictions and impediments except to the extent that they have been *expressly released therefrom by statute*. Further, such statutory release has been almost exclusively in the field of inheritance and succession and it is only where an intention to include them in a granted right is specifically spelled out that such is accorded them.

For example, Congress in providing for payment of veteran's pensions after the death of a veteran clearly distinguishes between a legitimate and illegitimate child in defining the term "child". 48 Stat. 481 (1934), 38 U. S. C. § 505 (1952).

We respectfully submit that this Court should also consider the effect on the marketability of copyrights of interpreting the word "children" in section 24 as including illegitimate children. Illegitimacy invariably by its very nature is shrouded in secrecy and the determination of paternity many times is not sought until after the death of the alleged father. In such circumstances on the death of a husband-author; for example, the marketability of copyright, which depends on exclusive and clear title to copyright, would be destroyed and the benefits withheld from the widow and legitimate children at a time when they would be in most need of such benefits, for the reason that the possibility of a claim by a later discovered illegitimate child would be a cloud on the clear title of the legitimate children.

We believe that a fair reading and review of the discussion by the court of appeals on this question of illegitimacy leads to the conclusion that they were mindful of the fact that authority was lacking to permit the inclusion of an illegitimate child within the terms of section 24 of the Copyright Act. Apparently that court feels that this is not the way the law should be, and in their words they have chosen to give to the Act what they call its "ordinary *live*-language meaning" (R. 67). We respectfully suggest that the proper place to remedy such a situation, if such is necessary, is in Congress, and in the instant case we believe that until such is done the rule of stare decisis should be followed and respondent herein denied the status of a child in so far as the provisions of the Copyright Act are concerned.

CONCLUSION

Petitioner respectfully submits that this Court should reverse the judgment of the court below and find that petitioner herein is exclusively entitled to the renewals of copyrights in her deceased husband's works accruing during her lifetime, and further find that respondent's ward herein is not a "child" within the meaning of the Copyright Act 17 U. S. C. § 24 (1952).

Dated: New York, N. Y., March 6, 1956.

Respectfully submitted,

PAT A. McCORMICK

Attorney for Petitioner

THEODORE KIENDL,
JOHN H. CLEARY, JR.

Of Counsel

APPENDIX A

17 U. S. C. § 24 (1952)

§ 24. Duration; Renewal and Extension.

The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication."

APPENDIX B

“§ 255. **Illegitimate child: Acknowledgment by father: Inheritance from father's kindred: Inter-marriage of parents: Inheritance from mother's kindred.** Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother's kindred, either lineal or collateral.”

APPENDIX C

“§ 230. **Adoption of illegitimate child.** The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption.”

Office - Supreme Court, U. S.

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APR 25 1956

HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 529

MARIE DESYLVA,

Petitioner,

vs.

MARIE BALLENTINE, as Guardian of the Estate of
Stephen William Ballentine,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Dated: April 23, 1956.

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No. 529

PETITIONER'S REPLY BRIEF

This brief is in reply both to the brief of respondent and the memorandum filed by the Solicitor General for the Register of Copyrights as amicus curiae.

POINT I

**RESPONDENT HAS MISCONSTRUED THE EFFECT OF
THE LEGISLATIVE HISTORY OF § 24 OF THE 1909 COPY-
RIGHT ACT.**

Respondent has failed to give effect to the fact that Congress in 1870 when it revised the Act of 1831 changed the word "and" to "or" and deleted the phrase "either or all then living". Obviously some reason must be attributed to the fact that the language was materially changed. The only logical conclusion that can be drawn therefrom is that in 1870 Congress intended to grant to the widow exclusive rights to renewals accruing during her lifetime.

Respondent further argues that the above noted deletions are of no moment and supports this assertion (Res. Br. pp. 56-17) by reference to portions of a report of the Committee on Patents in the Congressional Globe of the 41st Congress, 2d Session, Part 3 at pp. 2680 and 2854. A complete examination of this report as found in the Congressional Globe shows clearly that substantial changes were included in the proposed act. To illustrate this we quote from the report of the Committee on Patents from page 2680 of the Congressional Globe which immediately follows that portion of the report quoted in respondent's brief at page 16:

"In prospect of this proposed revision the Committee on Patents had already received numerous communications from those interested in the subject, and also numerous bills and petitions that had been filed in the House and referred to that committee, *proposing various amendments to the existing laws.* They had taken all these into consideration and invited the presence of persons interested in the different subjects to which the amendments were intended to apply, and encouraged discussion from those interested and from those learned in this branch of the laws upon those proposed amendments. *They were heard at great length, and the committee were very careful to give a hearing, either orally or by written communication, to any and every person who supposed that there were defects in the existing laws which ought to be remedied, or who could make plain and clear the practice under the laws so as to secure more perfectly the rights which these laws were intended to protect.* The result of all these hearings and discussions has been the adoption by the committee of certain propositions of amendment to these laws, which they have embodied in the bill now before the House.

The bill is so printed as to show the law exactly as it now is, in the form in which it came from the hands of the commissioners of revision. Every provision which is now in force has been printed at

length in the bill, although it is proposed to strike out by way of amendment many of them. All those which it is proposed to strike out are printed, and the amendments, *many of which are substitutes for the parts proposed to be omitted*, are also printed separately, and in italics, so that they may be clearly distinguished from the law as it now is. The House, therefore, now have before them in the reported bill the exact state of the law, those provisions of the law which it is recommended shall be dropped, and of the new provisions which shall be substituted in their place, and also of the minor amendments which are proposed to different parts of the bill. It can be seen, therefore, at once what has been the law, what is the law, in what respects the existing law is supposed to be defective, how that defect is proposed to be amended, and how the law will read if the amendment should be adopted." (Emphasis added)

POINT II

PETITIONER'S INTERPRETATION OF THE WORDS "WIDOW OR CHILDREN" IS SUSTAINED BY LOGIC AND AUTHORITY.

The briefs submitted in this case show that no one prior to 1944 urged that a widow must share with children the renewal rights which she secured in her deceased husband's works during her lifetime. In 1944, the law had been in effect for 35 years. In the meantime the leading textwriters had affirmed the widow's priority. (See pp. 9-10 and footnote 2, p. 10 of brief of Motion Picture Association of America, Inc., *amicus curiae*.)

It is significant that of the six commentators cited by respondent as sustaining its interpretation of "widow or children" (Res. Br. pp. 20-23), two were written after the decision of the court of appeals in this case and all were written subsequent to 1943.

Respondent has not finished its quotation from Chafée, *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 527 (1945) and has thereby sought to cast a meaning upon the language entirely different from that intended by the author. The full quotation from Chafée reads as follows:

"Do the widow and children of a dead author take successively or as a united group? The Copyright Rules and Regulations treat them as all on the same step, *but I have seen no case in point.*" (Emphasis added to indicate matter omitted by respondent)

Petitioner cannot explain why there was a sudden questioning of earlier opinions in certain quarters after 1943 except for the clue in the brief submitted by the Register of Copyrights. He annexes a letter written in 1944 by Mr. Richard C. DeWolf, then Acting Register of Copyrights, to Ligon Johnson, Esq., in which he states "the [Copyright] Office has never felt that the matter was clear enough to justify taking the position that a child could not renew so long as the widow was living. Our policy, as you know, is to register the renewal in the name of any beneficiary who seems reasonably entitled and leave the apportionment of interests among various beneficiaries to be settled by them or by a court if need should arise." (Register of Copyrights' Brief, pp. 27-28).

Inasmuch as this is the earliest suggestion anywhere that children might challenge the ownership of renewal rights by their widowed mother, we asked the Register of Copyrights upon receipt of the Register's brief to furnish a copy of Mr. Ligon Johnson's letter which prompted this reply—particularly since Mr. Johnson had been an active participant in the hearings and legislation relating to the United States Copyright Act of 1909, The British Copyright Act of 1911 and The Canadian Copyright Act of 1921.

Mr. Johnson's letter, here made public for the first time, states the views then universally prevailing among authors and their attorneys as follows:

April 19, 1944

Mr. Richard C. DeWolf
Acting Register of Copyrights
Washington, D. C.

Dear Mr. DeWolf:

I had a somewhat interesting question raised today and wonder if the Copyright Office has any rule or custom which might afford a precedent.

The question was as to construction of the provisions of Section 23 as to renewal rights of a widow, widower or child.

I know it was the intent of the Patents Committee to vest renewal rights in the order namely, that is if the author was survived by a widow, the widow had the right of renewal and the renewal copyright vested in her, if there was no widow, then the right vested in the children, if no children, the executor and if no executor in the next of kin. The punctuation of the section appears to bear this out, this intent and construction and I think it is the intent of the Act. There have been decisions in general terms that the rights descended in the order specified, but no specific holding on this exact point.

Any other construction would bring endless confusion. Suppose there was a widow and a half dozen minor children, and the widow renewed. If the children had joint rights with the widow, the widow could not convey or license, and to get any conveyance or license under the renewal a guardian would have to be appointed for each of the children.

Again, where the children were of age, instead of the widow having the right to convey, the widow and children would be tenants in common and while none could alone convey any exclusive right each might convey non exclusive rights as against the others, so that as many non-exclusive rights might

be conveyed as there were widow and children and the rights hopelessly messed up. There would necessarily be a complete check up of survivors of the author under each renewal, which would often be impossible.

And still again, under such a construction what rights would the widow renewing have in the copyright or returns from the renewal rights? If there are six children does she hold one seventh of the copyright or what? Must each child be paid one seventh of the proceeds, and who would be liable if one or more are unpaid?

Has the Copyright Office any rule or custom with the widow applying, where there are known children, and is the widow told that the copyright renewal should be taken out in the name of the widow and all the children and not merely by the widow alone.

I know in the past, the generally accepted construction has been that when a widow survives and renews the renewed copyright vests in her, under which she could make any necessary license or conveyance, and only the widow executed such contracts.

One of the motion picture attorneys, at this late day, has asserted that the commas, in the Act were meaningless and the 'or' meant 'and', and to secure any valid assignment or license under a widows renewal it was necessary to ascertain if there were children, and if so require that each child should join in the contract, with the money jointly paid.

I would be greatly obliged if you would advise me if there were any Copyright Office rules, regulations or customs that would throw any light on the situation.

I, myself, believe that the question now raised neither conforms to the intent of Congress, the meaning of the wording of the Act or the long accepted construction of the Section.

Sincerely yours,
Ligon Johnson"

It should be observed that, consistent with Mr. DeWolf's "then" personal opinion in the matter, the Copyright Office, at that time and since, did and does accept renewal applications from anyone named in § 24 without attempting to decide disputes as between them. The resolution of all such disputes should properly be left to the courts, as in the case at bar. Certainly, the acceptance of a renewal claim should not be deemed to confer any beneficial interest on the person obtaining it merely by reason of its issuance—especially in view of the present tendency of the courts to treat one who erroneously makes a claim to ownership as a trustee holding his naked legal title in trust for the true owner.

This case involves a construction of the copyright law, which is intended primarily to benefit authors as a means of encouraging them. Authors have uniformly understood, and the 1909 Act should be so interpreted, that their widows will not be placed at the mercy of children who wish to embroil them in litigation and impair their ability to effectively market the works of their deceased husbands. Moreover, if, in the last years of the original term of copyright, the author continues to have the possibility of progeny, he will be unable to market his works through channels such as motion pictures or other media which require a great investment. And even as to existing children—if they are minors he will be required to have a guardian appointed to approve the sale of their renewal rights, and part of the purchase price will have to be set aside until they reach majority. This would seriously interfere with the free flow of literary and musical works and would impede, rather than promote, the objects of the copyright clause of the Constitution (art. 1 § 8) and the enactments thereunder.

POINT III

EXCLUSIVITY IN COPYRIGHTS ENHANCES AND MAINTAINS THEIR VALUE.

Respondent attempts to create the impression that one of the purposes of the renewal copyright provision was to enable the owners of the renewal term to divide or "split" the renewal copyright among two or more publishers and that there presently is a trend in that direction. To substantiate this contention respondent sets forth (Res. Br. pp. 28-29) the title of seventeen musical compositions which are presently in their renewal term, and the copyright of each of which has been "split" among two or more publishers.

Among these seventeen musical compositions there is not one in which the respective rights of widows and children are involved. All of these seventeen musical compositions involve assignments by original collaborating composers, or where one of them had died, by his widow, or in cases where there was no widow, by his children, or where there were no children, by his next of kin.

These musical compositions are not representative of musical compositions in general, nor do they indicate any general practice or trend. During *each* of the past ten years upwards of ten thousand copyrights were renewed. A great many of such renewal copyrights covered musical compositions which were assigned to publishers. As against these seventeen songs, in which renewal copyrights have been split, the records of the Copyright Office will show tens of thousands of copyright renewal registrations and assignments where the renewals were not split, but were assigned to a single publisher.

The value of the work during the renewal copyright term depends just as much upon exclusivity as it does in the

first or original term. Respondent's contention that there is generally economic benefit in having more than one publisher in the renewal term is fallacious. Musical compositions such as are involved in the instant case are best exploited when they are owned by a single publisher.

Since the death of George G. DeSylva the copyrights of 199 musical compositions written by him already have been renewed. (See p. 29 of brief of Music Publishers' Protective Association, Inc., *amicus curiae*.)

Many of these musical compositions were written by Mr. DeSylva in collaboration with very prominent composers, such as George Gershwin, Walter Donaldson, Victor Herbert, Jerome Kern, Emmerich Kalman, Ray Henderson, Lew Brown, Ira Gershwin, Al Jolson, and Richard Whiting.

Without exception these prominent and experienced composers and petitioner herein have recognized the advantage of having an exclusive publisher and have already assigned their renewal rights to certain particular publishers. (Appendices B through G attached to brief of Music Publishers' Protective Association, Inc., *amicus curiae*.)

The unity of interest which has been preserved thus far is now being seriously threatened by reason of respondent's attempted fragmentation.

The correctness of this practice is more obvious when it is applied to other types of work such as books, plays and dramatic works. The splitting of a copyright in a book or play among two or more motion picture producers, for instance, would render it valueless because neither owner would make the investment necessary to produce a motion picture based upon it.

Respondent argues (Res. Br. p. 30) that in the case at bar the child receives for his partial interest the sum of \$100,000 "plus everything else that would have been received by Mr. and Mrs. DeSylva and more", and respondent concludes that the recovering of this investment would be

an incentive to the second publisher to exploit the properties. This is not true. A reading of the agreement made by the second publisher with respondent, Appendix H, annexed to brief amicus curiae of Music Publishers' Protective Association, Inc., shows that the \$100,000 is an advance and *only* chargeable against performance fees to be received by the second publisher from the American Society of Composers, Authors and Publishers. It is not an advance nor chargeable against royalties which might become payable to respondent by reason of publication, or the licensing of phonograph records or uses in motion picture or other similar means of "exposure". The \$100,000 payment clearly is not calculated to induce the second publisher to expose the work to the public. The sums paid by the American Society of Composers, Authors and Publishers out of its general publishers' performance fund will be paid by reason of performances for profit of the compositions such as radio and television broadcasts.

In fact, it is almost an arithmetical certainty that the second publisher will recoup his investment within a definite period of time which actually can be computed on the basis of the regular quarter annual distributions made by the American Society of Composers, Authors and Publishers to its members, and to recoup this investment the second publisher need not print a single copy nor procure a single phonograph record of any of the songs involved or expose them in any other way.

POINT IV

**EXCLUSIVITY IS TO THE ADVANTAGE OF BOTH
AUTHOR AND PUBLISHER.**

Respondent has attempted to create an issue between authors and composers on the one hand and publishers and assignees on the other hand as to the reason for the provision for the second term of copyright. (Res. Br. p. 7)

To substantiate this so-called issue between authors and publishers respondent has referred to the industry accepted form of contract between authors and publishers established by Songwriters Protective Association, which provides that at the expiration of the original term of copyright, all rights and benefits revert to the author. (Res. Br. p. 31 n. 30)

The contract thus referred to makes no reference to the family of the author. It merely provides that after the first term of copyright the work shall revert to the author. The purpose of this reversion is to enable the author, if he is dissatisfied with the first publisher, and the merit of the work warrants it, to enter into new arrangements on better terms. There is nothing in this contract to indicate that the assignment of the renewal term should not be made to a single publisher, and as a matter of fact it is the general industry practice for collaborating authors and composers to assign their work in the second or renewal copyright term to a single publisher, whether he be the original publisher or a new publisher. In fact as heretofore stated all musical compositions in which George G. DeSylva collaborated with composers have been assigned for both the original and renewal term of copyright to a single publisher.

Obviously, a composer is in a position to demand a higher price for his renewal rights from a publisher if he is able to convey such rights exclusively for the simple reason that he has more to sell. Likewise, a publisher is willing to pay a

higher price for the exclusive renewal rights of a composer because he is obtaining more for his money and will be protected in his exploitation and sale of the properties and compositions assigned.

Dated: New York, N. Y., April 23, 1956.

Respectfully submitted,

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October Term, 1955.

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vs.

MARIE BALLENTINE, as Guardian of the Estate of
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Respondent.

On Petition for Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

Questions Presented.

1. Does a surviving spouse of a deceased author have the sole right to the renewal rights granted by the Copyright Act, which accrued after the author's death, to the exclusion of the children of the author?
 2. Is an illegitimate child excluded from all rights granted by the Copyright Act with respect to renewal privileges?
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Statutes Involved.

The pertinent portion of Title 17, U. S. C., Section 24, providing for the renewal of copyrights reads as follows:

"Duration: Renewal and Extension:

"The copyright secured by this title shall endure for twenty-eight years * * * *And provided further, That* * * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: * * *."

Respondent respectfully calls this Court's attention to the omission by Petitioner in her printing of an excerpt from the above statute (page 3 of Petition for Certiorari) of the word "widower" from the phrase "widow, widower or children" as contained therein. The omitted word provides additional clarification in the interpretation of this statute.

Reasons for Denying the Petition.

It is well established that the right involved in this case (to wit, the renewal right which first accrues upon the expiration of the copyright period) is a new creation of the Copyright Act, and exists only by virtue of the privilege granted by Congress directly to certain classes of persons; the original copyright and its ownership dies upon expiration of the term of the copyright; the renewal

right is a new estate clear of all rights, interests or licenses granted under the original copyright. (*G. Ricordi & Co. v. Paramount Pictures* (1951), C. A. N. Y., 189 F. 2d 469, cert. den. 342 U. S. 849, 72 S. Ct. 77.) The right of renewal is not dependent upon or fixed by the law of descent; it never goes into the estate of the decedent as property. If the author is living at the time the renewal right accrues, he is solely entitled to that right; if he is dead at that time, the renewal right goes directly by virtue of the grant in the Act, and not by inheritance, to the groups of persons enumerated in the statute. (See, *Silverman v. Sunrise Pictures Corp.* (1921), 2d Cir., 273 Fed. 909, 911.) When one of a group entitled to renew obtains the renewal for himself, he does so for the benefit of and in trust for the entire group. (See, *Tobani v. Carl Fischer, Inc.* (1938), 2d Cir., 98 F. 2d 57, cert. den. 305 U. S. 650, 59 S. Ct. 243, 83 L. Ed. 420 (one of the deceased author's children renewed and the renewal was held to be for the benefit of and on behalf of all of the children); *Silverman v. Sunrise Pictures Corp.*, *supra* (renewal by two of the next of kin held to be a renewal for the benefit of and in trust for all next of kin who were members of the class).

No reason is advanced why this cause should be reviewed by this Court.

(a) There Is No Conflict With the Decision of Another Court of Appeals on the Same Matter.

The opinion of the Court of Appeals is not in conflict with the case of *Silverman v. Sunrise Pictures Corp.*, *supra*. The opinion specifically analyzes that case and points out that the phrase "order of enumeration" as used in that case (as well as by a number of commentators) in-

dicates an enumeration by classes; the widow would not be preferred to the exclusion of the child, both being treated by Congress as a class specified in the second enumeration, and both being properly expectant of the author's bounty.

(b) The Court of Appeals Has Not Decided a Federal Question in a Manner in Conflict With Any Applicable Decision of This Court.

McCool v. Smith (1861), 66 U. S. 218, 1 Black 459, considered the inheritance of real property, and is not applicable to the issues here involved which concern a grant of renewal rights by the Copyright Act directly to the groups named, and not with the matter of inheritance. The opinion of the Court of Appeals treats of the *McCool* case, and points out its inapplicability to the issues here involved. See, also, *Hutchinson Investment Co. v. Caldwell* (1894), 152 U. S. 65, 68, 69, cited by the Court of Appeals.

(c) No Important Federal Question Is Raised Which Requires Settlement by This Court.

This is the first instance since the present statutory language was adopted (in 1909) that the particular issue involved has arisen and, as the opinion of the Court of Appeals stated and as the petitioner then conceded, there were no cases determining the respective claims between widows and children, respecting copyrights.

All that is involved in this case on the issue of the priority of renewal rights is the interpretation of the above-set-forth portion of the Copyright Act as between the widow and child, which particular clause is clear in its meaning and has a limited application. The issue only arises in the event the renewal right accrues after the

death of the author and, then, only in the event of a dispute between the surviving spouse and children. In the instant case, a further factor was injected by the fact that the mother of the child and the deceased were never married, so that the dispute became one between the widow of the deceased author and his only child, an acknowledged illegitimate son. The treatment of the issues in the opinion of the Court of Appeals presents nothing requiring the further treatment of those issues by this Court.

(d) The Fact That the Court of Appeals Did Not Venture an Opinion on Extraneous Matters Not Before It Is No Reason for This Court to Grant Certiorari.

The Court of Appeals disposed of the issues between the parties before it. It had no occasion or reason to discourse upon what the rights of other parties might be had they been before the Court, such as in a situation that would have been presented had the minor not been the only child of the deceased author.

(e) The Decision of the Court of Appeals Is Clearly a Correct Interpretation of the Intelligible and Plain Language of the Statute; Is Also in Accordance With the Recognized Purpose of the Act to Protect Both the Widow and Children of the Deceased Author; and Is Also in Accordance With the Practice and Views of the Copyright Office.

The renewal provision in question is designed to protect the widow, widower and children against situations therefore existing wherein authors, who died prior to the accrual of renewal rights, had previously disposed of those rights (often prior to the establishment of their true value, and for a mere fraction of such true value), leaving wives and children without sufficient protection. By the terms

of the statute, an author who dies before renewal rights accrue cannot dispose of those rights in disregard of the interests of the widow (or widower), or children, or both, by deed, will, or otherwise.

If the author survives the original period of copyright and renews the copyright during his lifetime, then the remaining classes of persons enumerated in the statute do not acquire any interest in the renewed copyright. Similarly, if the author is dead and the first class enumerated in the statute renews, then the members of the succeeding class enumerated in the statute have no interest in the renewed copyright. Accordingly, if petitioner's interpretation of the statute were adopted, the surviving spouse would be in one class and the children of the author would be in a succeeding class, with the result that when the surviving spouse renews the copyright, such renewal would be to the complete exclusion of the children for all times. Thus, if petitioner prevailed in the instant cause, the child would be excluded in all participation in the copyrights renewed by her, even though her death immediately followed such renewal.

The fact that certain commercial interests might find it easier to deal with copyrights if the protection granted by the statute were eliminated or modified does not present persuasive reason for disregarding the language and purpose of Congress, and divesting children of the rights and protection granted to them by the statute. Usually a number of persons own a single copyright together, whether by reason of co-authorship, or otherwise, and the industry has always functioned accordingly. In any event, these are matters which should be addressed to the attention of Congress, and do not present a ground for review by this Court.

(f) The Alleged Failure to Exhaust Administrative Remedies Presents No Ground for a Review of This Cause by This Court:

(1) The alleged issue is not a question of jurisdiction, was never before raised by either party or passed upon by the District Court, or by the majority opinion in the Court of Appeals and, in any event, presents no ground for granting certiorari, as set forth in Rule 19 of the Rules of this Court.

(2) The petitioner has never before raised this issue and has, in fact, waived it. The judgment granted by the District Court was in favor of petitioner in response to petitioner's motion, and was prayed for by petitioner in her pleading filed in the District Court. In petitioner's Opening Brief (p. 2) on her cross-appeal to the Court of Appeals from the decision of the District Court, petitioner sets forth and affirms the basis for the jurisdiction of the District Court. In her present petition (p. 5) petitioner also states the basis for jurisdiction of the District Court.

(3) There were no administrative remedies to be exhausted. The contention of petitioner in this respect arises from a misconception of the nature of a registration of copyright, and of the function of the Copyright Office (as distinguished from the Patent Office). A statutory copyright runs in favor only of a person entitled thereto (regardless of who attempts registration), and is effected by the publication of the work with notice, which act takes place before the registration. The registration is not a grant of a copyright; it is merely a registration of a claim to a copyright; it is a technical requirement which must be met before suit is brought on the copyright. The registration certificate provides merely *prima facie* evi-

dence as to its contents and does not relieve the claimant of the burden of proof as to his rights. (*Saak v. Lederer* (1909, Pa.), 174 Fed. 135, 98 C. C. A. 571; 17 U. S. C., Secs. 1, 10, 11, 12.) The Copyright Office does not make the determination that the registrant is the person entitled to the copyright. Neither judicial functions nor discretion are conferred upon the Copyright Office in this respect, nor does the Copyright Office presume to exercise such function or discretion. (Rules of the Copyright Office, 17 C. F. R., Secs. 201.2(a), 202.1; Committee Report (No. 2222) on Bill Enacting Copyright Act of 1909, Sec. 53, 60th Congress, 2d Session Report No. 2222 to Accompany H. R. 28192.) In this respect, the Copyright Office does not function like the Patent Office. The Copyright Office, in fact, registers conflicting claims. [See, letter of George D. Cary, legal advisor to Copyright Office, Rep. Tr. pp. 8-10.]

(4) Since a renewal by one of a class entitled to renew is for the benefit of all, there is no necessity or purpose for all to file separate renewal registrations in order to determine or preserve their rights among themselves, or in order to determine whether they are indeed members of the class. One may have a claim or right arising under the Copyright Act without having himself filed the claim to copyright or the renewal thereof. In this case, it was duly alleged that the renewals in question had been made and that they were made by petitioner, on behalf of the minor. The claim of the minor was not merely as to his right to register a renewal, but also that renewals made pursuant to the Copyright Act had been made on his behalf.

(5) The determination of rights in this action is final and settles the issues passed upon, so far as the parties

are concerned. No further registrations of renewals will be necessary with respect to the renewals already accomplished.

(6) Declaratory relief may be a proper remedy before as well as after application for renewal is made. (See *Carmichael v. Mills Music, Inc.*, (D. Ct., S. D. N. Y., 1954), 121 Fed. Supp. 43.)

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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BRIEF FOR RESPONDENT.

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2 Socolow, The Law of Radio Broadcasting (1939), Sec. 686, p. 1218	23
29 Southern California Law Review (1955), pp. 23, 28, Bricker, Renewal and Extension of Copyright	23, 27
19 St. John's Law Review (1945), pp. 95, 98	21
2 Sutherland, Statutory Construction (3rd. Ed.), p. 451	11
2 Warner, Radio and Television Rights (1953), Sec. 81, p. 246	23
Webster's New International Dictionary (2d Ed., Unabrid.)	12

IN THE
Supreme Court of the United States

October Term, 1955.

No. 529

MARIE DESYLVA,

Petitioner,

vs.

MARIE BALLENTINE, as Guardian of the Estate of
STEPHEN WILLIAM BALLENTINE,

Respondent.

BRIEF FOR RESPONDENT.

Questions Presented.

(1) When a deceased author leaves a surviving spouse and child, do they both share in the benefits of the copyright renewal which thereafter accrues, or does the surviving spouse receive the renewed copyright to the exclusion of the child?

(2) Does the term "children," as used in 17 U. S. C., Sec. 24 (1952), include an acknowledged illegitimate child?

Statement of the Case.

This cause was decided in the Trial Court upon motion for summary judgment [R. 29, 33]. In the Trial Court, the plaintiff (respondent here), and defendant (petitioner here), both moved for summary judgment [R. 14, 24].

The Trial Court made its determination based upon the undisputed facts and stipulations of the parties [R. 20-24], and determined that the child, Stéphen William Balentine, also known as Stephen William DeSylva [R. 17], a minor, was the child of George G. DeSylva, the deceased author, within the meaning of 17 U. S. C., Sec. 24 (Appendix A) [R. 32].

The undisputed facts before the Trial Court, among other things, proved that the decedent, during his lifetime, generally and formally acknowledged the child; that the acknowledgment of the child constituted an acknowledgment within the meaning of California Probate Code, Section 255 (Appendix B) [R. 30].

The issue relating to the question of whether or not the child was fully legitimated within the meaning of California Civil Code Section 230 (Appendix C), being in dispute upon the facts, was not submitted for determination on the motions for summary judgment.

Respondent appealed from that part of the judgment which held that the widow was the sole owner of the renewal copyrights accruing after the death of George G. DeSylva [R. 35]. Petitioner appealed from the Trial Court's determination that the minor child was a child of George G. DeSylva within the meaning of the Copyright Act [R. 35].

Both appeals were decided against petitioner by the decision of the United States Court of Appeals for the Ninth Circuit [R. 47-67], one judge dissenting [R. 67-71], 226 F. 2d 623 (C. A. 9th, 1955).

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Summary of Argument.

The provisions of law (17 U. S. C. Sec. 24) providing for a second and new term of copyright following the expiration of the original copyright, are a new and second grant by Congress of protection to certain classes of persons, and particularly for the protection of the class "widow, widower, or children." The provisions of the Act grant a completely new franchise and new right to those whom Congress has designated as the dependents of a deceased author, and these rights cannot be dissipated, altered or varied by the author. The author cannot, during his lifetime, dispose of the rights of his family in the renewals and the same are not subject to his testamentary disposition.

The surviving spouse does not receive the renewed copyright to the exclusion of a surviving child because:

(a) The express words of the Act delineate that the entire immediate family of a deceased author, to wit, the "widow, widower, or children," share the renewed copyright as a class;

(b) The Legislative history, as well as the obvious policy and purposes of the statute, confirm the construction that the surviving spouse and child share equally in the renewal benefits;

(c) Considerations of equity and conscience which prompted the enactment of the statute denote that the surviving widow does not obtain all rights in the copyright to the exclusion of the surviving child of the author; and

(d) There is no practice in the amusement or publishing industries or economic considerations which should prompt this Honorable Court to construe the

statutory enactment as now constituted, in a manner which differs from its express language and from the intent of Congress.

The statute does not differentiate between legitimate and illegitimate children. The common law concept of *nullius filius* is not applicable to a determination of this cause, because the particular legislation was enacted to protect dependents of the author without distinction between children conceived and born in lawful matrimony and other children who are the progeny and dependents of the deceased author. If for any reason, renewal rights granted by Congress in the Copyright Act should be interpreted by the rules governing inheritance, the child in the instant cause is fortified and nevertheless established as a child within the meaning of the Act by the fact that he is acknowledged under the law of the domicile of the parties and therefore inherits from his father under the applicable domiciliary law.

When the widow renewed copyrights following the death of the author, she did so as a member of a class, and as a member of that class must account to the child who is the other member of that same class, for all benefits received.

ARGUMENT.

POINT I.

Basic Principles Underlying the Concepts of Copyright Franchise and the Grant of the Right of Renewal.

A consideration of the basic principles underlying the grant by society of the copyright franchise assists in the clarification of all issues in this cause.

(1) Nature of Right Created.

The copyright franchise which the copyright law gives to the author and his family, is an intangible, incorporeal right in the nature of a privilege or franchise, and is *distinct from the property copyrighted*.¹

(2) The Second Grant of 28 Years.

In this cause we are concerned only with the so-called "renewal right" or second term of copyright protection. Congress, in enacting the present copyright law, was faced with the problem—should there be one long term of copyright, or should there be two shorter terms? In its desire to protect the creator of copyrightable works and his dependents,² Congress adopted the latter alternative. Con-

¹*Stephens v. Cady*, 55 U. S. (14 How.) 528, 14 L. Ed. 528 (1852); *Security-First Nat. Bank of Los Angeles v. Republic Pictures Corp.*, 97 Fed. Supp. 360 (S. D. Cal., 1951), rev'd on other grounds; *Republic Pictures Corp. v. Security-First Nat. Bank of Los Angeles*, 197 F. 2d 767 (C. A. 9th, 1952); *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (1769).

²See *Chafee, Reflections on the Law of Copyright*, 45 Col. L. R. 503, 507-508 (1945). "There is the author's surviving family. It often happens that the author does not receive the full benefit of a copyright because he dies before it expires. The benefit and the monopoly may then pass to his widow and children, or to more remote relatives. So far as the widow and minor children go, we all recognize this result as eminently desirable. It goes against the conscience of society that destitution should seize on the family of

gress was aware of the dramatic poverty which attended the immortal authors and composers and their families, and recognized that authors frequently part with their copyrights for sums which have no relation to the true monetary value of the work. The primary and only purpose for enacting legislation which provided a split period of copyright was to give a second, new and separate grant (or so-called "second chance") to authors and their dependents by the renewed copyright.³

a man who has made possible great public good. Furthermore, the wish to provide for one's widow and children is one of the strongest incentives to work for all human beings. Erskine, after his maiden argument at the bar, was asked how he had the courage to stand up so boldly before Lord Mansfield, and answered: 'I could feel my little children tugging at my gown.' The biographies of authors show that they are more subject than most men to indolence * * *. Consequently, the prolongation of the benefit beyond the author's life so that it reaches his immediate family is amply justified." The author also cites from Macauley that "Milton's grand-daughter had to be relieved from abject poverty by a benefit performance of 'Comus' at the very time that the publisher who owned Milton's works was enjoining a pirate in Chancery."

³*Harris v. Coca-Cola Co.*, 73 F. 2d 370 (C. C. A. 5th, 1934), cert. den. 294 U. S. 709, 55 S. Ct. 406, 79 L. Ed. 1243 (1935); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 42 Fed. Supp. 859 (S. D., N. Y., 1942). It is stated in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U. S. 643, 653, 63 S. Ct. 773, 777, 87 L. Ed. 1055; 1062 (1943):

"* * * should there be one long term, as was provided for in the bill resulting from the conferences held by the Librarian of Congress, or should there be two shorter terms? The House and Senate committees chose the latter alternative. They were aware that an assignment by the author of his 'copyright' in general terms did not include conveyance of his renewal interest. * * *

"By providing for two copyright terms, each of relatively short duration, Congress enabled the author to sell his 'copyright' without losing his renewal interest. If the author's copyright extended over a single, longer term, his sale of the 'copyright' would terminate his entire interest. That this is the basic consideration of policy underlying the renewal provision of the Copyright Act of 1909 clearly appears from the report of the House committee which submitted the legislation (the Senate committee adopted the report of the House committee, see Sen. Rep. 1108, 60th Cong., 2d Sess.)"

"The limitation which the second proviso imposes upon the author's power to dispose of the right of renewal during his life was * * * clearly intended to protect widows and children from the supposed improvidence of authors in the colloquial sense * * *

A consideration of the express language of the Act demonstrates that the value of the second term to the author's widow and children, and others designated, results from the paradox that what we denominate as the renewal copyright is not a renewal or extension, but is actually a new right, completely independent of the property in the original copyright, which is given to the designated persons, or groups of persons, in the order specified in the Act.⁵ The protection of the "split term" is afforded to the author and his family, as distinguished from, or in opposition to, the interests of the publishers who would prefer the facility of acquiring all copyright interests at the outset. The original copyright franchise is intended to protect the author, whereas the protection afforded by the second copyright, or renewal term; is, in fact, protection to the author *and his family* from the so-called class of "assignees," and from a complete and improvident parting with all rights. Therefore, Congress provided the

⁴*Shapiro, Bernstein & Co. v. Bryan*, 123 F. 2d 697, 700 (C. C. A. 2d, 1941).

⁵*M. Witmark & Sons v. Fred Fisher Music Co.*, 38 Fed. Supp. 72 (S. D. N. Y., 1941), aff'd 125 F. 2d 949 (C. C. A. 2d, 1942), aff'd *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U. S. 643, 63 S. Ct. 773, 87 L. Ed. 1055 (1943), *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F. 2d 469 (C. A. 2d, 1951); *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 902, 19 A. L. R. 289 (C. C. A. 2d, 1921); *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247 (C. C. A. 1st, 1911); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 115 Fed. Supp. 754 (S. D. N. Y., 1953), rev'd on other grounds, 221 F. 2d 569 (C. A. 2d, 1955), reh. 223 F. 2d 252 (C. A. 2d, 1955); *Fitch v. Shubert*, 20 Fed. Supp. 314 (S. D. N. Y., 1937); *Southern Music Pub. Co. v. Bibb-Lang*, 10 Fed. Supp. 975 (S. D. N. Y., 1935).

second term as a completely new estate, clear of all rights, interests or licenses granted under the original copyright.⁶

Congress drafted the renewal portions of the Act in such manner that the original creator could not, by any method, deprive his family of their renewal rights.⁷ The provisions made for the second term of copyright are clearly a recognition by Congress that by the very event of the death of an author, his family stands in more need of the only means of subsistence ordinarily left to it.⁸

In the absence of such renewal right, or in the absence of action taken pursuant to such right, the author's work would automatically enter public domain upon the expiration of the original copyright term. It is particularly important to observe that the "right" of renewal, if not acted upon, dies. It never goes into an estate of a decedent. The Act is diametrically opposed to the concept of testamentary disposition; and it is not related to, dependent upon, or fixed by the law of descent.^{9a} The right

⁶*Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 42 Fed. Supp. 859 (S. D. N. Y., 1942); *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F. 2d 469 (C. A. 2d, 1951), cert. den. 342 U. S. 849, 72 S. Ct. 77, 96 L. Ed. 640 (1951); *Shapiro, Bernstein & Co. v. Bryan*, 27 Fed. Supp. 11 (S. D. N. Y., 1939).

⁷In *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909, 19 A. L. R. 289 (C. C. A. 2d, 1921), the Court stated:

"* * * the author cannot take away the rights of widow, children, etc., before the opening of the last year of original copyright. It is not until then that any estate or chose in action arises or exists; and when such right arises it is * * * a new estate, not a true extension of the existing copyright."

⁸Register of Debates, Appen. cxix (1830).

^{9a}Section 24 of Title 17 U. S. C. is not a statute of inheritance but creates a new right. The right to the renewal does not grow legally out of the original copyright, but is a "new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty." *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909, 911 (C. C. A. 2d, 1921), cert. den. 262 U. S. 758, 43 S. Ct. 705, 67 L. Ed. 1219 (1923). See, also, *Shapiro, Bernstein & Co. v. Bryan*, 123 F. 2d 697, 700 (C.

to apply for a renewal in the twenty-eighth year of the original copyright period is not a hereditament, and is not capable of being inherited. The foregoing concepts are important to a consideration of the renewal provisions designed primarily for the protection of the immediate family of the author, and are particularly important to a consideration of the concept of the word "children" as used in the statute.

POINT II.

The Statute Does Not Give the Widow or Widower Priority on the Renewal of Copyrights to the Exclusion of the Children of the Author.

- (1) The Language of the Statute Clearly Shows That No Priority Is Provided Within the Immediate Family Class of "Widow, Widower, or Children."

"The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture." (*Thompson v. United States*, 246 U. S. 547, 551, 38 S. Ct. 349, 351, 62 L. Ed. 876 (1918).)

It is the position of respondent that "widow, widower, or children" constitute a single class, and that respondent's position is sustained by the words of the statute.

The pertinent portions of Title 17, U. S. C., Section 24, providing for the renewal of copyrights, reads as follows:

"Duration; renewal and extension:

"The copyright secured by this title shall endure for twenty-eight years * * * And provided fur-

C. A. 2d, 1941). The purpose of the aforesaid section is to provide, as a matter of public policy, that the right of renewal should be personal and that the dependents of the author should not, in any way, be cut off from the benefit of the new monopoly. *White-Smith Pub. Co. v. Goff*, 187 Fed. 247, 253 (C. C. A. 1st, 1911).

ther, That * * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: * * *." (See Appendix A.)

It is contended by petitioner that if the widow or widower survives, such widow or widower has the sole right in the renewed copyright, and enjoys the entire renewal copyright to the exclusion of the author's children. The interpretation contended for by petitioner could only apply if the language of the statute were entirely different from the wording actually adopted. In order for the statute to conform to petitioner's contention, it would be necessary that the language of the Statute read:

"Copyright may be renewed by the widow or widower, if the author be not living, or, if neither the author nor the widow, or widower is living, then by the children."

It is the absence of such language which petitioner attempts to read into the statute which demonstrates that the family is treated as a class. The difference between the Act, as it actually reads, and the way petitioner would like to have it construed as reading, is obvious.

The intention to provide for the widow, widower, and children as a class is clearly and unequivocally demonstrated by the fact that the statute indicates the priority of each particular group or class entitled to the renewal

privilege by the use of a qualifying phrase inserted between each group or class. *No such qualifying phrase is used or found in the Act within the group or class of "widow, widower, or children."* The statute provides that the author is entitled to the renewal, and then follows the qualifying phrase, "if (he is) still living"; next, the widow, widower or children are entitled to the renewal, and then follows the qualifying phrase, "if the author be not living"; next, the Act provides "or if such author, widow, widower or children be not living, then the author's executor, etc. * * *". The Act does not provide a qualifying phrase between "widow, widower, or children of the author," to separate the one from the other as separate classes. It does not seem probable that Congress would have used the word "or" to denote priority between "widow, widower, or children," when, in fact, the language of the statute delineates a qualifying phrase as between all other classes.

Petitioner contends that the widow or widower takes precedence over the children, based upon the fact that the language referring to the family group of "widow, widower, or children" employs the coordinating article "or," and that such word is used in the disjunctive, meaning alternative. The words "or" and "and" are frequently used loosely and without precision, and their sense is more readily departed from than that of other words.⁹ It is well established that the conjunctive and disjunctive are signified interchangeably by the use of the word "or."¹⁰

⁹*Murphy v. Zink*, 136 N. J. L. 235, 239, 54 A. 2d 250, 253 (1947); *Asher v. Stacy*, 299 Ky. 476, 479, 185 S. W. 2d 958, 959 (1945); 2 Sutherland, *Statutory Construction* (3rd Ed.); 451.

¹⁰*Union Starch & Refining Co. v. N. L. R. B.*, 186 F. 2d 1008, 1014 (C. A. 7th, 1951), cert. den. 342 U. S. 815, 72 S. Ct. 30, 96 L. Ed. 617 (1951), and cases therein cited; *Tyson v. Burton*, 110 Cal. App. 428, 432, 294 Pac. 750, 752 (1930).

Moreover, using the word "or" as an alternative does not denote a priority unless we modify the language employed by reading into it some qualifying phrase such as, "or, if a widow or widower does not survive, then the children." To superimpose such a qualifying phrase would modify the language used in the statute by a construction foreign and contradictory to its present language.¹¹

The word "or" is quite generally used to indicate both the conjunctive as well as the disjunctive, such as "and/or." For example, if a United States Savings Bond is payable to "John Doe or Jane Doe," it is clear that although either John Doe or Jane Doe may apply to cash the bond, both own it. Likewise, a bank account in the name of "John Doe or Jane Doe" indicates that either may utilize the funds, and that both have rights therein. The fact that the framers of the present law intended to use the word "or" in the conjunctive sense, as well as the disjunctive (i.e., "and/or") is clearly demonstrated from the other uses of this same word "or" in the accompanying phraseology in the same statute. Note particularly the use in the conjunctive as well as disjunctive sense demonstrated by the language immediately following the class, "widow, widower, or children"; to wit, "if such author, widow, widower, or children be not living."

If the word "and" were used instead of the word "or" in the clause, "widow, widower, or children," there would be those who would contend that all must join in the

¹¹ Webster's New International Dictionary (2d Ed., unabridged), defines "or" as: "a coordinating particle that marks an alternative; as you may read or may write. It often connects a series of words or propositions; presenting a choice of either; as, he may study law or medicine or he may go into trade." Disregarding our feelings of what he should study, it is clear that the word "or" by itself indicates a choice and nothing more—it does not indicate which choice is preferable until language is added or read into the sentence to indicate that. To do so would, of course, modify the language used in the statute by construction.

application for renewal, and that if any one failed or refused to join, the renewal would be invalid.

The Act provides for substitution, not of the children for the widow or widower, but of the "widow, widower, or children" for the deceased author. It is possible that under given situations relating to wills and deeds that the word "or," when construed in connection with the entire "four corners of the document" may be interpreted as a word creating substitution by reason of the intention of the testator or grantor as gleaned from the entire document. If we interpret the statute by its "four corners," it is obvious that the intent is to substitute "widow, widower, or children," in a class for the deceased author, and that the word "or," in light of the intention of Congress as disclosed by the entire statute, cannot be interpreted in accordance with the suggestions of the petitioner.

(2) The Intention of Congress to Grant Equal Rights to All Members of the Immediate Family of the Deceased Author Is Demonstrated by the Legislative History of the Act.

The intention of Congress is clearly demonstrated by the fact that an earlier, rejected draft of the statute, prepared during the 59th Session of Congress, read:

"That the copyright . . . may be further renewed and extended by the author, if he be still living, or if he be dead, leaving a widow, by his widow, or in her default or if no widow survive him, by his children . . ." (Sec. 19, H. R. 19853 and S. 6330, 59th Cong., 1st Sess., entitled, "A Bill to Amend and Coordinate the Acts Respecting Copyright."),

and that the said draft was revised by the following 60th Congress, which enacted the present law, to omit the distinction between widow, widower or children. The final, revised Act is more clearly understood when we observe

the report of the Committee of the 60th Congress, as follows:

"Your committee do not favor and the bill does not provide for any extension of the original term of twenty-eight years, but it does provide for an extension of the renewal term from fourteen years to twenty-eight years; and it makes some change in existing law as to those who may apply for the renewal. Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then the author's executors, or, in the absence of will, his next of kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for renewal." (H. Rep. 2222, 60th Cong., 2d Sess., pp. 14, 15.)

The report of this Committee is also cited in greater detail by this Honorable Court in the case of *Fred Fisher Music Co. v. M. Witmark & Sons*, *supra*.¹²

The Act of 1831, for the first time, granted a renewal right to the widow and children, following the death of the author. All parties concede that under the Act of 1831 the widow and children shared in the renewal copy-right. Peculiarly, petitioner and the *amici curiae* do not seem to be disturbed by the fact that the 1831 Act did not provide the percentage of division, and therefore we must assume that all parties concede that the widow and

¹²318 U. S. 643, 654-655, 63 S. Ct. 773, 778, 87 L. Ed. 1055, 1062-1063 (1943).

children shared the renewal as a class even under the prior statute.

This Act of 1831 provided:

“ . . . that if, at the expiration of the aforesaid term of years, such author be still living, or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author, designer, or engraver, or, if dead, then to such widow and child, or children, for the further term of fourteen years.”

In granting the privilege of exercising the renewal by persons other than the author for the first time, Congress delineated that all of the designated class of persons entitled to renew need not be living at the end of the first term, and for this purpose inserted the phrase, “either or all then living.”

The 1870 Act¹³ provided, in part:

“ . . . that the author, if he be still living, . . . or his widow, or children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years. . . . ”

The word “child” was eliminated in the Act of 1870 because the word “children” adequately described one or more children. The import of the words, “either or all then living,” was replaced in the Act of 1870 by substituting the word “or” between the words “widow” and “children,” thus indicating, in the same manner as had the phrase, “either or all then living,” that it was not necessary that every person in the class survive to the

¹³Copyright Act of July 8, 1870, c. 230, Sec. 88, 16 Stat. 212.

end of the first term, and that it was not necessary that every person in the class join in the renewal application.¹⁴

It is contended by petitioner that the said Act of 1870 (enacted by the 41st Congress, Second Session) eliminated the word "and" between the word "widow" and the word "children," as provided in the Act of 1831, and it is petitioner's position that the 41st Congress thereby made some drastic change in the existing law. This is not the fact, and a review of the statute of 1870 will clearly indicate that the Act of 1870 retained all of the provisions of the existing law (including all benefits bestowed by the Act of 1831). In this respect note that the Congressional Globe, 41st Congress, Second Session, Part 3, page 2680, referring to the bill reported by the Commissioners of Revision stated: "It (the bill) was examined by that Committee (House Committee on Revision of Laws) and was found to *embody all the provisions of existing law*, in brief, clear, and precise language." (Emphasis as well as parenthetical portions added.) The foregoing is emphasized further by the Congressional Globe of said 41st Congress, Second Session, at page 2854, where we find the following reported:

"The Committee have also considered the effect of the proposed revision upon all existing legal rights, and in the clause of repeal and the schedule of acts

¹⁴Of considerably more importance to the case at bar are three items, which are readily apparent from the Act of 1831. First, historically it is not true that Congress has always evidenced an intent to prefer a widow to the exclusion of children in conferring a benefit under Federal statutes, and, more particularly, under the Copyright law. Second, that although the widow and children shared as a class, the Act of 1831 is completely silent on the subject of the proportionate share to be allocated to each member of the class. Third, Congress apparently saw no insurmountable problems regarding proportionate shares or the marketability of the copyrights, even to the extent that it was not deemed necessary to spell out the proportionate shares which the widow and children would each take.

repealed referred to in it *they have carefully preserved every existing right*, extending the remedial provisions of this act to all proceedings and suits hereafter commenced, so that where remedies are enlarged they will be available to all those who shall seek those remedies upon existing rights hereafter. That is the principle by which the committee has been governed in offering amendments to the bill and also in considering the report of the commissioners of revision. *Their object has been, not to disturb any existing rights or to take away any remedies, but to enlarge the remedies in every case where they could do so consistently with the principle of the law.*" (Emphasis added.)

- (3) The Objects and Purposes of the Statute, as Well as Considerations of Equity and Conscience, Point Unerringly to the Construction That the "Widow, Widower, or Children", Constitute a Single Class for Renewal Purposes.

We have noted that the only reason for the split term is to protect the author and those dependent upon him, and that the renewal portions of the Act were only designed to protect widows and children from the supposed improvidence of authors.¹⁵ This Honorable Court has held that considerations of equity and conscience may enter into the interpretation of statutory enactments.¹⁶ If additional words must be added to construe the Act, then words should be added which best place the Act in implementation

¹⁵*Shapiro, Bernstein & Co. v. Bryan*, 123 F. 2d 697, 700 (U. C. A. 2d, 1941).

¹⁶*S. E. C. v. C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350, 64 S. Ct. 120, 123, 88 L. Ed. 88, 93 (1943); *United States v. Datterreich*, 320 U. S. 277, 280, 64 S. Ct. 134, 136, 88 L. Ed. 48, 51 (1943), *re. den.* 320 U. S. 815, 64 S. Ct. 367, 88 L. Ed. 492 (1943); *Dinkins v. Cornish*, 41 F. 2d 766, 767 (E. D. Ark., W. D., 1930); 50 Am. Jur. 283-297.

of its apparent and inherent purposes which are primarily to grant protection to the immediate family of the author. A child is as much a dependent to be protected by society as is a widow or widower. As a matter of public policy, a widow, widower, and children are equally entitled to protection. Various intestate provisions almost universally provide that the child, the widow and the widower all share in the estate of the deceased spouse and parent, and the laws relating to pretermitted heirs are further evidence that society is normally unwilling to accept a failure to provide for children. (Note: The foregoing analogies are not intended to create the impression that there is a relationship between hereditaments and the copyright franchise, because the copyright franchise is a grant by society of a privilege to certain persons, or groups of persons, who society believes are in need of protection or benefits and, in this respect, the copyright franchise, and particularly the renewal right, is entirely different from an incorporeal right which may be the subject of testamentary provision or intestate succession.) As representatives of society, legislatures have historically enacted statutory protection for children. Congress did not intend to prefer any one of the class, "widow, widower, or children," to the other.

If precedence were given to the widow or widower over the children with respect to renewals, such widow or widower would receive not merely a life estate, but the entire right,¹⁷ and even if the widow or widower died immediately thereafter, the entire copyright would nevertheless go to the estate of such widow or widower, and not to the author's children. Congress did not so provide, and did not intend such unjust result.

In this respect, petitioner's brief, page 14, states that "granting preference to the widow with respect to the

¹⁷Cf. *White-Smith Music Publishing Co. v. Goff*, 187 Fed. 247, 250 (C. C. A. 1st, 1911).

renewal copyright does not mean that the children are excluded" and that "upon the death of the widow the renewal copyright becomes the property of the children." These statements are contrary to law and misleading, because if the widow should receive the renewal to the exclusion of the children, that ends all rights of the children in the second twenty-eight years. Many examples may be given of situations illustrating the need for direct protection of children of an author. Thus: the last wife or husband of an author who married two or more times would take the renewal to the exclusion of the author's children of earlier marriages; the widow or widower may be improvident, or might favor the children of a subsequent marriage entered into after the death of the author, to the prejudice of the author's children; or the widow or widower may be on unfriendly terms with the author's children, and deprive them of the protection intended by Congress.

- (4) Problems of Construction Are Traditionally Within the Province of the Court. The Solution Is Not Dependent Upon the Divergence of Opinions That Exist in Copyright Practice, and Cannot Be Resolved by Taking Evidence of the Economic Advantage or Disadvantage Resulting From Respective Constructions.

Petitioner and the *amici curiae* suggest that the industry and its counsel have generally accepted the fact that a widow or widower surviving a deceased author has the sole right to the renewed copyright to the exclusion of the surviving children of the author. We state, without painstaking, that this suggestion is untrue. We respectfully submit that many leading counsel throughout the entertainment industries and perhaps a substantial majority thereof, hold the opinion that the surviving spouse and children constitute a single class, just as the group, "next of kin," constitutes a class under the Act. The

opinion of the Honorable Court of Appeals does not come as a surprise to anyone who has given the statute appropriate consideration.

The entire publishing and entertainment industries are aware of Circular No. 15 of the Copyright Office, entitled, *"Instructions for Securing Registration of Claims to Renewal Copyright,"* which is also often cited by legal writers on the subject of copyright, and which states in its very first provision the following:

"The following persons are entitled to claim a renewal copyright:

"1. Aside from the groups of works mentioned in Paragraph 2, below, renewal copyrights in all works (including works by individual authors which appeared in periodicals or encyclopaedic or other composite works), may be claimed by the following groups of persons:

"(a) The author of the work, if he is still living at the time when renewal is sought.

"(b) *If the author is not living, his widow (or widower), or children may claim renewal.*

"(c) If neither the author, his widow (or widower), nor any of his children are living, and the author left a will, the author's executor may claim renewal.

"(d) If the author died without leaving a will, and neither his widow (or widower) nor any of his children are living, his next of kin may claim renewal." (Emphasis added.)

The position of the Copyright Office stated by George D. Carey, Principal Legal Adviser to the Copyright Office [R. 8-10] that the widow or widower does not take precedence over the children and that the benefits of the

renewals are held as tenants in common, so that if one of the class renews it is for the benefit of all, has not been obscured from the industry and its counsel these many years. In the absence of direct case authority, the construction by those charged with the duty of executing the statute is entitled to persuasive weight and ought not to be overruled without cogent reasons.¹⁸

See *Chafee, Reflections on the Law of Copyright*, 45 Columbia Law Review, 503, 527 (1945), where, after citing Section 23. (original) the author states:

"Do the widow and children of a dead author take successively or as a united group? The Copyright Rules and Regulations treat them as all on the same step (Copyright Rules and Regulations (1942), §201.24(2), 17 U. S. C. A. 109 (Supp. 1944));...

In 19 St. John's Law Review 95 (1945), at page 98, in discussing ownership in common of copyrights, the author, Theodore R. Kupferman, states that ownership in common results "* * * from the succession of spouse and children or next of kin to the renewal right as provided for in Sections 23 and 24 of the Copyright Act of 1909. If the author does not survive to apply for renewal in the twenty-eighth year of the statutory copyright, then his widow or children may apply, taking as tenants in common."¹⁹

¹⁸*Billings v. Truesdell*, 321 U. S. 542, 552, 64 S. Ct. 737, 743, 88 L. Ed. 917, 923 (1944); *Turnbull v. Cyr*, 188 F. 2d 455, 457 (C. A. 9th, 1951); *Hoague-Sprague Corporation v. Frank C. Meyer Co.*, 31 F. 2d 583, 585 (E. D., N. Y., 1929). See also, *Bent v. C. I. R.*, 56 F. 2d 99, 102 (C. C. A. 9th, 1932).

¹⁹Citing Copyright Act of 1909, Sec. 23, 17 U. S. C., Sec. 23; 44 Col. L. Rev. 712, 717, and stating that the regulations of the Copyright Office place them all in one category. (C. II, Title 37, C. F. R. (1939), Sec. 201.24(2).)

See, also, *Kupferman, Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 *Columbia Law Review* 712, 717 (1944):

"First come the spouse and children of the author.
* * * it is submitted that the spouse does not take precedence but that spouse and children hold together as tenants in common."

See *Tannenbaum, Practical Problems in Copyright*, C. C. H. Law Handbook, 7 *Copyright Problems Analyzed* 7, 12 (1952):

"Whether the widow takes precedence over the children in renewing the copyright has not been adjudicated, although this question is constantly troubling the Copyright Bar. The sound and only proper view is, that the widow and children are members of the same class, any member of which can apply for the renewal and obtain legal title to the renewal but he will be deemed a trustee thereof for the other members of the class. If it were the intention to give the widow precedence over the children, the Act would have so stated. The section would then have read, that the widow could renew, if the author is not living, or if neither the author or widow is living, then the renewal should be by the children.

"The injustice of holding otherwise is evident in the case where an author had been married several times and was survived by children by a prior marriage.

"Could it be said that the Act intended that the wife who was the widow at the death of the author should take the entire renewal to the exclusion of the children by a prior marriage? Where the widow and several children survive, and one child files a

renewal, he holds the legal title for himself as trustee for the widow and each of the other children.”²⁰

See *Bricker, Renewal and Extension of Copyright*, 29 So. Cal. L. Rev. 23, 28 (1955), which states: “A careful reading of the section leads to the conclusion that the widow, widower and children constitute one class.”

See, also, recent case comment 69 Harv. L. Rev. 1129 (1956).

In view of the text of the statute and the expressions of the leading authorities indicated above (as well as others), it would appear that one who has researched the subject could hardly contend for a strong element of surprise in the opinion of the Honorable Court of Appeals. Furthermore, can it be said that those who deal constantly with the Copyright Office are not familiar with the regulations of that office prescribing the rules for obtaining renewals of copyrights in that office?

The renewal portion of the Copyright Act was adopted to protect authors and their families from losing the entire right to assignees. From the standpoint of assignees, prudent business practices have always dictated that they should acquire as many and as extensive rights as possible before the particular work attains its full commercial value. Prudent business considerations also dictate²¹ that an expectancy can be acquired for a lower cost before it matures. Obviously an assignee would like to eliminate competition by having all and the only rights. Assignees, therefore, generally attempt to acquire all future expectancies; however, they are frustrated by the fact that there is no way, under the Act, in which an

²⁰See also 2 *Warner, Radio and Television Rights*, 246, Sec. 81 (1953); 2 *Socolow, The Law of Radio Broadcasting*, 1218, Sec. 686 (1939). Cf. *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909, 912 (C. C. A. 2d, 1921), cert. den. 262 U. S. 758, 43 S. Ct. 705, 67 L. Ed. 1219 (1923).

assignee can be absolutely certain of obtaining the renewal term, or even an absolute interest therein, prior to its actual vesting. The assignee is never completely safe until he has contracted for the expectancies of the following: the author; the author's wife or husband and the author's children; the author's potential executors; the author's next of kin; the author's possible next wife or next husband; the author's children to come and next of kin to come; and these contractual problems are multiplied by the number of authors who have contributed to a single work and by their respective relationships in life.

The Court will note that the deceased, George G. DeSylva, in all cases wrote with several co-authors and composers. All works were written and copyrighted with collaborators. See Appendix to Brief of Music Publishers Protective Association, Inc. as *amicus curiae*, C-5, D-9, D-10, D-11, D-12, D-13, D-14 and E-9.

Despite these many deterrents, petitioner and certain of the *amici curiae* refuse to recognize that the acquisition of expectancies contemplates the risks of living men in a changing world, and that the very purpose of the renewal section of the Act is to protect these classes of persons who may be the recipients of the freshly renewed copyright from the loss of the same prior to the time that the right accrues.

The so-called "practical arguments" of petitioner and the *amici curiae* were made in the committee sessions prior to the enactment of the present law, and by the publishers at all times since that date. The publishing industry was at all times opposed to the split term of copyright and the concept of the second term of franchise which gave a fresh, new and unfettered right of renewal to the immediate members of the author's family and others. The publishers (and assignees generally) have made no secret of their desire to have a single term

of copyright extending over the entire period of fifty-six years in order to facilitate the acquisition of all rights in a copyright, and in order to avoid the bargaining and the new considerations which must be paid and expended to obtain the renewal term. It is no secret that these arguments have been made by the publishers against the enactment of the Act, as well as against the Act since its enactment.

The briefs of petitioner and *amici curiae* have afforded the opportunity to again quarrel with the statute, which in fact was not designed to facilitate the acquisition of renewal rights by publishers, but was in fact designed to give protection against such prior alienation of the right from the family group.²¹

Petitioner argues that the renewed copyrights would be worth more to the widow and others if the child had no interest therein. The answer to this contention is found in the statement of the learned Justice Cardozo:

“One does not lose what is one’s own because its utility would be greater if it were awarded to some one else.” *Golde Clothes Shop, Inc. v. Loew’s Buffalo Theatres, Inc.*, 236 N. Y. 465, 141 N. E. 917, 30 A. L. R. 931 (1923).

The final answer to the “practical arguments” of petitioner and the *amici curiae* is determined by the very fact that Congress rejected these same arguments by enacting and reenacting the split term or renewal section of the copyright provisions in substantially its present form.²²

Unfortunately, it has been suggested that the decision of the Honorable Court of Appeals in the instant cause

²¹Senate Report, 60th Cong., 2d Sess.

²²Act Mar. 4, 1909, c. 320, Sec. 23, 35 Stat. 1080; Act Mar. 15, 1940, c. 57, 54 Stat. 51; Act July 30, 1947, c. 391, Sec. 1, 61 Stat. 652.

has created some new confusion or new problem which did not previously exist. The very nature of the situation indicates that such is not the case and that the various problems have existed since the enactment of the Copyright laws.

This Honorable Court has stated, in the case of *Fred Fisher Music Co. v. M. Witmark & Sons*:

“The question is, whether the author or the bookseller should receive the reward.’ . . . The meaning of this sentence read in its context is quite clear. By providing that, if the author should not survive the original term, his renewal interest should, instead of falling into the public domain, pass to his widow and children, Congress was of course preferring the author to the bookseller.”²³

²³318 U. S. 643, 651, 63 S. Ct. 773, 776, 87 L. Ed. 1055, 1061 (1943). Although this Honorable Court held, by a divided opinion, against the authors on the question of assignability of the “renewal” expectancy, the booksellers (assignees) have certainly not received a complete victory, because the assignment can only be of an expectancy which may, or may not, come into existence insofar as the assignor is concerned because the expectancies or chose in action may never exist unless the author survives the original term. The law does not particularly favor assignments of expectancies and tends, in general, to limit alienations in the nature of perpetual leases, licenses, perpetuities, etc., and the question therefore arises as to whether or not agreements to assign expectancies will be enforced in equity when, in fact, the subject-matter does come into existence. The assignee must be prepared to meet the equitable defense of inadequacy of consideration, as well as legal defenses. (See *Fred Fisher Music Co. v. M. Witmark & Sons*, 381 U. S. 643, 647, 63 S. Ct. 773, 775, 87 L. Ed. 1055, 1059 (1943).) In *Rossiter v. Vogel*, 134 F. 2d 908 (C. C. A. 2d, 1943), and *Carmichael v. Mills Music*, 121 Fed. Supp. 43 (S. D., N. Y., 1954), summary judgment was denied when the author contended that the transfer should not be enforced because of inadequacy of consideration and unconscionable advantage taken of him at the time the contracts were executed.

After the passage of the first twenty-eight year period, the problem of determining who owns a copyright may become difficult, indeed. Renewal operates like a fresh registration. It is therefore necessary to go back to the author or composer for several of

Although the particular question raised here as between widow, widower and children has not been previously directly passed upon by the courts, it has been repeatedly held that where one of a class entitled to renew a copyright obtains the renewal, he holds the same in trust for the benefit of the entire class.²⁴ In view of the fact that there is only one child (and one widow), it is not necessary for this Court to determine a situation involving several children; however, since the "widow, widower, or children" constitute a class, the law is well settled that if one member of a class renews, the renewed copyright results to the benefit of all members of that class living.

them, in the case of almost all musical compositions), and their families, executors, next of kin, and start all over again to determine which of the various classes designated under Section 24 of the Act survive. This problem is certainly not new in the industry and is inherent in the very nature of a right which first accrues after the lapse of twenty-eight years from the date of publication of the original copyright material.

The assignees, having gained the limited advantage of a determination that the Act of Congress (Sec. 24, Copyright Act) permits the author to contract for the assignment of the expectancy, now seek to limit the number of persons from whom such assignments must be secured in order to obtain such further benefit; however, they are faced with the problem that the author cannot contract away the rights of the widow and children, whom Congress has protected, unless the author is living in the twenty-eighth year of the original term, when the new estate accrues. In view of this Court's divided opinion in the case of *Fred Fisher Music Co. v. M. Witmark & Sons, supra*, one can agree to convey an expectancy when it matures; however, the assignees nevertheless continue to have the problem of attempting to predetermine or predesignate the identity of the recipients of such expectancy, and therefore continue to direct their efforts towards the acquisition of the entire protected period, when, in fact, the legislation adopted by Congress was designed to give a new franchise and a new source of revenue to the particular class of persons surviving at the time the renewal right accrues.

²⁴*Tobani v. Carl Fisher, Inc.*, 98 F. 2d 57 (C. C. A. 2d, 1938), cert. den. 305 U. S. 650, 59 S. Ct. 243, 83 L. Ed. 420; *Silverman v. Sunrise Pictures Corp.*, *supra*. See also, *Edward B. Marks Music Corp. v. Jerry Vogel Music Co., Inc.*, 140 F. 2d 266, 267 (C. C. A. 2d, 1944); *Edward B. Marks Music Corp. v. Wonnell*, 61 Fed. Supp. 722, 727 (S. D., N. Y., 1945); *Bricker, Renewal and Extension of Copyright*, 29 So. Cal. L. Rev. 23, 28 (1955).

at the time. This rule of law has been applied universally, and without exception in cases arising under the Act.

Literally thousands of works protected in the second period of copyright are presently being published in such renewal period by new and different publishers, as well as more than one publisher, for the reason that the respective authors and collaborators, and their widows, widowers, and children, as well as executors, next of kin, etc., have determined that it is to *their best economic interests* to give the renewal rights to different publishers.²⁵ Although the Copyright Office registrations and recordings are numerous, and encompass every variety of situation, reference to such recordings will clearly indicate the trend in the renewal period.²⁶ The records of our courts are

²⁵We submit that most instances of "split copyrights" cause vigorous competitive bidding for the respective rights of the class (and for the respective rights of the co-authors), thereby resulting in the beneficiaries of the renewal copyright grant realizing a greater total amount.

²⁶"DADDY LONG LEGS"

By Joe Young; Harry Ruby, Sam Lewis.

Published by Warock Music, Inc., and Mills Music, Inc.

"HOW YA GONNA KEEP 'EM DOWN ON THE FARM"

By Joe Young, Sam Lewis; Walter Donaldson.

Published by Warock Music, Inc., and Mills Music, Inc.

"I'M ALWAYS CHASING RAINBOWS"

By Joe McCarthy, Harry Carroll.

Published by Fred Fisher Music Co., Inc., and Robbins Music Corp.

"ROCK A BYE YOUR BABY WITH A DIXIE MELODY"

By Sam Lewis, Jean Schwartz, Joe Young.

Published by Warock Music, Inc., and Mills Music, Inc.

"ON THE ALAMO"

By Gilbert Keyes (pseud. of Gus Kahn), Joe Lyons, Isham Jones.

Published by Forster Music Pub., Inc., and Bantam Music Pub., Inc.

"AMERICA I LOVE YOU"

By Edgar Leslie, Archie Gottler.

Published by Edgar Leslie, Inc., and Mills Music, Inc.

"BALLIN' THE JACK"

By Cris Smith, Jim Burris.

Published by E. B. Marks Music Corp. and Jerry Vogel Music Co., Inc.

also testimony to the practice which exists in the second period.²⁷

"WAITING FOR THE ROBT. E. LEE"

By Lewis Muir, Wolfe Gilbert.

Published by LaSalle Music Publ., Inc. and Alfred Music Co., Inc.

"BRIGHT EYES"

By Harry Smith, Otto Motzan, M. K. Jerome.

Published by Jerry Vogel Music Co., Inc., and Mills Music, Inc.

"I AIN'T GOT NOBODY, AND NOBODY CARES FOR ME"

By Roger Graham, S. Walter Williams.

Published by Jerry Vogel Music Co., Inc., and Mayfair Music Corp.

"I'LL BE WITH YOU IN APPLE BLOSSOM TIME"

By Albert Von Tilzer, Neville Fleeson.

Published by Jerry Vogel Music Co., Inc., and Broadway Music Corp.

"MARGIE"

By Russell Robinson, Benny Davis, Con Conrad.

Published by Fred Fisher Music Co., Inc., and Mills Music, Inc.

"MY MELANCHOLY BABY"

By George Norton and Ernie Burnett.

Published by Shapiro-Bernstein & Co., Inc., and Jerry Vogel Music Co., Inc.

"NOBODY'S SWEETHEART"

By Gus Kahn, Ernie Erdman, E. Schoebel.

Published by Mills Music, Inc., and E. H. Morris & Co., Inc.

"SHEIK OF ARABY"

By Harry Smith, Francis Wheeler, Ted Snyder.

Published by Mills Music, Inc., and Jerry Vogel Music Co., Inc.

"TUCK ME TO SLEEP IN MY OLD (KEN) 'TUCKY HOME"

By George W. Meyer, Samuel Lewis, Joseph Young.

Published by Warock Music, Inc., and Bourne, Inc.

"WHISPERING"

By John Schoenberger, Vincent Rose, Richard Coburn.

Published by Fred Fisher Music Co., Inc., and Miller Music Corp.

²⁷A typical example is *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 49 Fed. Supp. 135 (S. D., N. Y., 1943) aff'd 140 F. 2d 270 (C. C. A. 2d, 1944), in which several persons collaborated in a musical composition entitled "I Wonder Who's Kissing Her Now". Thereafter one of the copyright owners who had filed application for renewal and who had assigned to one publisher, attempted to deny the remaining co-author's right to assign to other publishers. Actions have been brought upon renewed rights registered by cousins. For example, *Fitch v. Shubert*, 20 Fed. Supp. 314 (S. D., N. Y., 1937).

Obviously this Honorable Court cannot, in this proceeding, take evidence as to what may, or may not, be best for the economic interests of authors and their families, or for that matter, of assignees, because in this cause we are presented with the express language of the statutory enactment which cannot be modified by the weight of evidence.²⁸ However, in view of the contentions made by petitioner and some of the *amici curiae*,²⁹ we observe that:

In the second period we are dealing with the value of a work in the twenty-ninth year and thereafter, following the first date of publication, and there is no necessity for one exclusive publisher.

The Brief of Music Publishers Protective Assn., Inc., as *amicus curiae*, in the Appendix, B to H, inclusive, dramatically emphasizes the economic benefit of having more than one publisher in the renewal period. These contracts demonstrate that the child receives, only for his partial interest, the sum of \$100,000.00, plus everything else that would have been received by Mr. and Mrs. DeSylva and more.

It is of utmost importance that the renewed copyrighted work be constantly exposed to the public by one who has made a substantial investment in the "renewed" rights and is therefore interested in recovering the investment by exploiting the property. The more the exposure, the more the use, and the more the use, the more the income, and the greater the value. It is not improbable to as-

²⁸Respondent is faced with the task of answering four *amici curiae* briefs filed herein, which briefs consist, to a large extent, of arguments based on representations of existing economic conditions and business practices as to which the record in this cause is silent.

²⁹In so far as the *amici curiae* briefs repeat the arguments made in petitioner's brief, we shall not answer them separately herein but respectfully submit that those arguments have been answered by the other portions of this brief.

sume that if the original assignee should acquire the entire fifty-six year period, many of the older copyrighted works held by such assignees would be obscured by new copyrighted works acquired and would, in fact, be relegated to dusty warehouse shelves.³⁰

POINT III.

An Acknowledged Illegitimate Child Is a "Child" of the Original Copyright Owner Within the Meaning of the Renewal Provisions of the Copyright Law.

(1) The Common Law Concept of Quasi Nullius Fillius Has No Application in This Cause.

Petitioner contends that the respondent acknowledged child is not a child within the meaning of the word "children" as used in the Act, and that the ancient concept of *quasi nullius fillius* applies. Petitioner has thus taken the narrow, harsh position, that no one except a child born following a lawful marriage should be considered a "child" within the meaning of the word "children" as used in the Act, granting the benefits of the renewed copyright franchise to certain dependents of authors.

Under petitioner's contention all children born of a putative marriage, all children by adoption, all children who have been legitimated, all children solemnly acknowledged by their fathers, all children whose parents subsequently intermarry and all children conceived of void or

³⁰It is at times difficult to understand the position of some of the *amici curiae* in this matter, because the problem is not new. The Song Writers Protective Association (*amicus curiae* here) has established an industry-accepted form of contract between authors and publishers which provides that after the original period of copyright, all rights and benefits revert to the author and his family. We suggest that this is the principal accomplishment of that organization, and is, indeed, a commendable one.

illegal marriages, are excluded from the benefits bestowed by said Act, and such children would be excluded regardless of the love and affection or personal relationships which existed between the parent and such child, and the corresponding duty of support which universally prevails under our present social and legal system.

In this respect petitioner insists upon applying a rule of prejudice which existed at the time of William The Conqueror to the present-day construction of a statute designed and granted by society primarily to benefit the dependents of a deceased author after the author's death.

The concept contended for by petitioner originated in the civil law, and we find that it was adopted and applied, not as a rule of substantive law, but only as a rule of evidence or procedure. It will be recalled that William The Conqueror separated the civil and ecclesiastical courts and forbade tribunals of either class from obtaining cognizance of cases relating to the other. Among other things, ecclesiastical courts were given jurisdiction in probate and divorce matters and were particularly notorious for the punishment meted out for sexual offenses. That the rule of *quasi nullius filius* was merely a rule of evidence or procedure is affirmed by decisions of the English Chancery Court. We note, for example,

“ . . . a man cannot provide for the illegitimate children either of himself or of another man by any reference that involves an inquiry as to their paternity. The law allows no criterion of paternity but marriage. . . . ” (Per Bowen, L. J., *In the Matter of Re Bolton*, 31 Ch. D. 542 (1886).)

Even at common law the rule of *nullius filius* was confined to heirship and the right to hold church office; and in all other respects there was no distinction between an

"illegitimate child and another man."³¹ This common law policy was founded on the presumed evidentiary necessity,

"... that the heir should be one whose right could be ascertained, therefore marriage, an act capable of proof, could be relied upon as determining the heir."
(*Ayer, Legitimacy and Marriage*, 16 Harv. L. Rev. 22, 23 (1902).)

The rule of evidence which precluded proof of paternity by any means other than by first laying the foundation of a valid marriage, has long since disappeared from our judicial system, and *nullius filius* has faded in the limited range of its application in determining heirship. The word "children" now designates the progeny of human parents.

The common law made no provision for adopting, legitimating or acknowledging children, whereas, under the law now universally applied, an adopted child, as well as a child legitimated or acknowledged, is entitled to inherit from its parents.³²

We particularly note that there is no problem as to the identity of the acknowledged child in the instant cause. It has been stipulated by the parties that the child Stephen

³¹See 2 *Kent, Commentaries on American Law* (11 Ed., 1867), 230. In some cases the harsh rule was avoided through stratagem. In the old English case of *Wilkinson v. Adams*, 1 Ves. & Bea., 422, 462, 35 Eng. Rep. 163, 179, it is interesting to note that the opinion of Lord Chancellor Eldon at the outset is specific that the point considered "regards the real estate" as the title is affected by the will. And the Lord Chancellor, in the course of his opinion, states that the limitations as to the prima facie meaning of the word "child" derives from Coke and the citations are solely "cases of deeds." Coke, in Co. Lit. 3b.

³²The author under the Copyright Law may, of course, be either a man or a woman. There is no doubt that the universal rule provides that an illegitimate child inherits from its mother. It is also the universal rule that even an illegitimate child is a creditor of his father's estate for amounts necessary for support and education during its minority. Under all circumstances, an illegitimate child is entitled to support from its parents and is a dependent under the law.

is the child of the deceased author [R. 20], and it is undisputed that the child has been solemnly, formally and fully acknowledged by the father-author as his child [R. 21]; that the deceased author accepted said acknowledged child as his own, and dealt with him as his own; that he had no other children; that he wanted the child to know that he was his father; and that he would like to treat the child as a son, and wanted the child very much to treat him as a father [R. 23 and 24]. The child was formally acknowledged within the meaning of Section 255 of the Probate Code of the State of California [R. 22-24] (Appendix B).

It is submitted that the statute, itself, presents the most persuasive argument that *quasi nullius fillius* does not apply, because the statute was designed to protect children as dependents.

We must at all times bear in mind that "author," as that term is used in the statute, contemplates a female as well as a male author. The Act of 1909 uses the words "widow, *widower*, or children," indicating that the author may be a woman or a man, and this Court may take judicial notice that authors, in fact, often are women.

Although originally, under the concept of *nullius fillius*, an illegitimate could not inherit from either parent, this rule was relaxed at an early stage of common law development, so that even under the common law an illegitimate inherited from its mother. If an unmarried female author leaves a child surviving her, then, and pursuant to petitioner's contention, the child would have no claim upon the renewal copyrights. Certainly this was not the purpose or intent of Congress. Is it then the petitioner's contention that the word "children" as used in the statute includes illegitimates when the "author" is a woman, but does not include illegitimates when the "author" is a man? The answer is self-evident that there is no basis for such distinction.

(2) The Word "Children" as Used in Section 24 of the Act Includes an Illegitimate Child, Even When Not Acknowledged by Its Father.

Petitioner contends that an illegitimate child is *fillius populi*; that he occupies a social status tainted with disgrace, and that by virtue thereof his only recourse is to become a burden upon society. This contention is entirely and diametrically opposed to the very purpose of the renewal provisions of the Copyright Act which were enacted to protect the immediate dependents of a deceased author. The protection which Congress afforded in accordance with the enlightened social concepts which attended the enactment of the statute does not differentiate between legitimate and illegitimate children.

See the analogous case of *Middleton v. Luckenbach S.S. Co.*, 70 F. 2d 326 (C. C. A. 2d, 1934), which involved the deaths of several persons on the high seas. Recovery was sought under the Federal Death Act (46 U. S. C., Sec. 761 *et seq.*), which provided for a suit to recover damages for the benefit of "decedent's wife, husband, parent, child or dependent relative * * *." The questions presented in that case were whether under such statute an illegitimate child could recover damages for the death of its parent, and whether the parent of an illegitimate child could recover damages for the child's death. *The court answered both questions in the affirmative.* The opinion pointed out that in its ordinary meaning the word "child" would include an illegitimate child; that although under some constructions as found in legal dictionaries the word "child" means a legitimate child, such construction originated in the consideration of wills, deeds, and statutes of inheritance, which differ from the questions here under consideration. In language particularly appropriate to our case the Court went on to state:

"There is no right of inheritance involved here. It is a statute that confers recovery upon dependents,

not for the benefit of an estate, but for those who by our standards are legally or morally entitled to support. *Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that, under present day conditions, our social attitude warrants a construction different from that of the early English view.* The purpose and object of the statute is to continue the support of dependents after a casualty. *To hold that these children or the parents do not come within the terms of the act would be to defeat the purpose of the act.* The benefit conferred beyond being for such beneficiaries *is for society's welfare* in making provision for the support of those who might otherwise become dependent. *The rule that a bastard is nullius fillius applies only in cases of inheritance.* Even in that situation we have made very considerable advances toward giving illegitimates the right of capacity to inherit by admitting them to possess inheritable blood. 2 Kent's Commentaries (12th Ed.) 215." (Emphasis ours.)³³

In *Green v. Burch*, 164 Kan. 348, 189 P. 2d 892 (1948), the Kansas Supreme Court stated:

"The appellee places particular reliance upon the construction which was given by this court to the so-called 'soldiers' compensation act' in the case of *Miller v. Miller*, 116 Kan. 726, 229 P. 361, 362, 35 A. L. R. 787. In the last-cited case it was held that a son, who was the child of a bigamous marriage and therefore illegitimate, was within the statutory provisions granting soldiers' compensation benefits to minor children of veterans. In such case it was urged that in the absence of a specific provision to

³³70 F. 2d 326, 329-330 (C. C. A. 2d, 1934).

the effect that illegitimate children should share in the bounty of the state, the legislature necessarily intended that only children born in lawful wedlock should receive the compensation earned by the service of the veteran. In the Miller case, *supra*, this court clearly was passing upon the meaning which should be given to the term 'children' in Kansas. The involved statute provided that compensation should be paid for the use and benefit of the widow and minor 'children,' if any, and did not define the term 'children.' The opinion in the Miller case, *supra*, written by Mr. Chief Justice Johnston, reads:

"* * * Who are the minor children to whom reference is made? Manifestly, they are those for whose life the veteran is responsible and to whom he owes the obligation of maintenance. The statute makes no discrimination between legitimate and illegitimate minor children. It is an independent provision creating a new obligation of the veteran, recognizing his responsibility to support his minor children and applying the compensation awarded to that purpose. The theory on which compensation is payable to wife or minor children is his obligation and duty to support them. However, if there had been no statute creating a specific obligation, the father would still be liable for the maintenance of his illegitimate child as well as one born in lawful wedlock. In *Doughty v. Engler*, 112 Kan. 583, 211 P. 819, 30 A. L. R. 1065, the Court, after discussing the early common-law rule that parents were under no obligation to support illegitimate children, determined that this rule was repugnant to present day conceptions of social obligations, and so unadapted to our conditions, and so unsuitable to the needs of the people, that it cannot be regarded as a part of the law of this state * * *"

The view of the California Courts is enunciated in the case of *Turner v. Metropolitan Life Ins. Co.*, 56 Cal. App. 2d 862, 133 P. 2d 859 (1943). In this case the Court held that a "child" is either a son or daughter; a male or female in the first degree; the immediate progeny of human parents. The Court then stated:

"* * * It is a matter of common knowledge that in most cases the real purpose of life insurance is to provide for the maintenance of the insured's dependents; and as will be seen, if the insured father herein had lived he would have been legally bound by civil and criminal laws to maintain his child, notwithstanding it was his illegitimate child."³⁴

Petitioner would give an unchangeable meaning to the words "child" or "children," regardless of the passage of time or any change in circumstances. To propose the application of an early common law rule to this Act fails to recognize that a word may vary greatly according to the circumstances and time in which it is used.³⁵

³⁴56 Cal. App. 2d 862, 867, 133 P. 2d 859, 861 (1943).

³⁵*Mr.* Justice Holmes, in *Towne v. Eisner*, 245 U. S. 418, 38 S. Ct. 158, 159, 62 L. Ed. 372 (1918), said: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." The same phrase may have different meanings in different connections. (*American Security & Trust Co. v. Commrs. of the D. of C.*, 224 U. S. 491, 32 S. Ct. 553, 554, 56 L. Ed. 856 (1912)), and the same words may have different meanings in different parts of the same act, and of course may be used in a statute in a different sense from that in which they are used in the Constitution. (*Lamar v. United States*, 240 U. S. 60, 36 S. Ct. 255, 257, 60 L. Ed. 526 (1916).) Words of a statute to which meaning is to be given are not phrases of art with a changeless connotation. They have a color and a content that may vary with the setting (*First Nat. Bank & Tr. Co. v. Beach*, 301 U. S. 435, 57 S. Ct. 801, 804, 81 L. Ed. 1206 (1937)), and words are but labels whose content and meaning are continually shifting with the times. (*Mass. Protective Ass'n, Inc. v. Bayersdorfer*, 105 F. 2d 595, 597 (C. C. A. 6th, 1939).)

Petitioner relies on *McCool v. Smith*, 66 U. S. (1 Black) 470, 17 L. Ed. 218 (1861), in support of the contention that an illegitimate child does not share in renewal rights under the Copyright Law. The *McCool* case held that "next of kin," as used in an Illinois statute of descent, included only legitimate kin. That decision, however, was again considered by this Honorable Court some twenty-three years later, in *Hutchinson Investment Co. v. Caldwell*, 152 U. S. 65, 14 S. Ct. 504, 38 L. Ed. 56 (1894), and its application was expressly limited to the peculiar statute of the State of Illinois as it then existed. Furthermore, we should particularly note that the words "next of kin" under the common law doctrine of *quasi nullius filii* and the word "children" as applied to the dependents of a deceased author in present-day society, certainly have vastly different connotations.³⁶

Petitioner also cites the cases of *Ng Suey Hi v. Weedin*, 21 F. 2d 801 (C. C. A. 9th, 1927), and *Louie Wah You v. Nagle*, 27 F. 2d 573 (C. C. A. 9th, 1928), which cases involved an interpretation of the word "children" under the United States citizenship statutes, and in both cases it was held that the word "children" included only legitimate or legitimated children.

Both of these cases were decided by the same circuit which twenty-nine years later decided the appeal in the instant cause, and both cases were specifically rejected, in the present cause, by the present Appellate Court in the Ninth Circuit, on the ground that the doctrine of

³⁶Compare Note 35.

nullius in filii was not squarely considered and met in either case.^{36a}

It is understandable that under the climate which existed in California at that time, the earlier court was greatly concerned with the problem of Asiatics, born in China, who claimed American citizenship as illegitimate children of Americans (particularly Asiatics who were only cooperative in aiding the immigration of Asiatics). It is no doubt that for that reason the citizenship statutes now contain a definition of the word "child," specifically confining the term to legitimate or legitimated children. No such change has ever been made in the Copyright Act and, in any event, it is hardly likely that an author would acknowledge an illegitimate child merely to allow such child to participate in the renewal rights.

Petitioner contends that if illegitimates are permitted to participate in the claim to the renewal, much litigation would result. But has petitioner considered what may happen to children of authors if petitioner's contention was sustained? Under this contention every time a child or next of kin sought to enforce his or her rights to the renewal under the Copyright Act the issue of the validity of the marriage of the parents of the person claiming the right could be raised. Since the question would not arise until at least the expiration of twenty-eight years, it is

^{36a} See the very interesting case decided by the Court of Claims, *Compagnie Generale Transatlantique v. United States*, 78 Fed. Supp. 797 (1948), which holds that the purpose of the citizenship statute with respect to foreign-born illegitimates was to insure that the child had in it the blood of an American citizen and that that fact would be evident without the uncertainties of a contested trial of paternity. The Court here held that children born to an American citizen, a resident of Cuba, who had acknowledged them under Cuban law were American citizens under the citizenship statute.

obvious that matters of proof of the validity of the marriage of parents could become unduly harassing. We are not without knowledge that the artistic have many marriages, some void and some valid. If one could disenfranchise a child or next of kin by reason of technical invalidities existing in the marriages and intervening divorces of authors and composers, litigation would really become difficult and endless, and the problems presented to our courts would be multiplied, indeed.

(3) If Renewal Must Be Made by a Child Who Is Also an Heir of the Deceased Author, Then the Determination of Heirship Must Rest Upon the Law of the State of California.

Contrary to the position of respondent as stated above, petitioner contends that the Copyright Act is a statute of inheritance and, therefore, that the child must not only be a *child* of the deceased author, but must also be an *heir*. If it should be determined that the word "children" as used in the Act is in some manner related to the ancient, harsh common-law concept of *quasi nullius filius*, or heirship, then, and in such event, we must consider the status of heirship as fixed by the law of the domicile as controlling upon this issue.

This Honorable Court stated, in the case of *Seaboard Air Line Ry. Co. v. Kenney*, 240 U. S. 489, 36 S. Ct. 458, 60 L. Ed. 762 (1916), in construing the phrase "next of kin," as used in the Federal Employer's Liability Act:

"Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But, as speaking generally under our dual system of government, who are next of

kin is determined by the legislation of the various states to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law. But, it is urged, as next of kin was a term well known at common law, it is to be presumed that the words were used as having their common-law significance, and therefore as excluding all persons not included in the term under the common law; meaning, of course, the law of England as it existed at the time of the separation from the mother country. Leaving aside the misapplication of the rule of construction relied upon, it is obvious that the contention amounts to saying that Congress, by the mere statement of a class, that is, next of kin, without defining whom the class embraces, must be assumed to have overthrown the local law of the states, and substituted another law for it; when conceding that there was power in Congress to do so, it is clear that no such extreme result could possibly be attributed to the act of Congress without express and unambiguous provisions rendering such conclusion necessary. The truth of this view will be made at once additionally apparent by considering the far-reaching consequence of the proposition, since, if it be well founded, it would apply equally to the other requirements of the statute—to the provisions as to the surviving widow, the husband and children, and to parents, thus, for the purposes of the enforcement of the act, overthrowing the legislation of the states on subjects of the most intimate domestic character, and substituting for it the common law as stereotyped at the time of the separation. The argument that such result must have been intended, since it is to be assumed that Congress contemplated uniformity, that is, that the next of kin entitled to take under the

statute should be uniformly applied in all the states, after all comes to saying that it must be assumed that Congress intended to create a uniformity on one subject by producing discord and want of uniformity as to many others."³⁷

In 11 Am. Jur. (Conflict of Laws) 315; Sec. 16, it is stated:

"It is a general principle of law that the status or condition of a person and the relation in which he stands to other persons are fixed by the law of the domicile and that the status so fixed is recognized and upheld in every other state, so far as is consistent with its own laws and policy."

See, also, 15 C. J. S. (Conflict of Laws) 905, Sec. 14.

It is stated in 1P Cal. Jur. 2d, at page 91:

"Because of the fact that the state of the domicile of the person whose status is in question normally has a strong social interest in relationships involving status, the courts have naturally emphasized the

³⁷See, also, *Poff v. Pennsylvania R. Co.*, 327 U. S. 399, 66 S. Ct. 603, 90 L. Ed. 749 (1946) (construing the phrase "next of kin" as used in the Federal Employer's Liability Act).

Hutchinson Invest. Co. v. Caldwell, 152 U. S. 65, 14 S. Ct. 504, 38 L. Ed. 356 (1894). (construing the words "heirs" as used in Rev. St. Sec. 2269, relating to the issuance of patents on federal land). The United States Supreme Court was called upon to construe the federal land pre-emption law. The decision was that "heirs" should be construed, not as those who could be heirs at common law, but as those who could be heirs in the state in which the land lay.

Weyerhaeuser Timber Co. v. Marshall, 102 F. 2d 78 (C. C. A. 9th, 1939) (construing the word "child" as used in the Longshoremen's and Harbor Workers' Compensation Act, and holding that insofar as the statute gives a complete definition it is controlling; where no definition is given, state law controls).

Ellis v. Henderson, 204 F. 2d 173 (C. A. 5th, 1953), (construing the word "child" as used in the Longshoremen's and Harbor Workers' Compensation Act).

domiciliary law where questions of status are in issue. (Citations omitted.) A general principle of conflict of laws is that the status of a person and the relation in which he stands to other persons are fixed by the law of the domicile, and that the status so fixed is recognized and upheld in every other state, so far as is consistent with general doctrines of comity. (Citations omitted.)”

With respect to children acknowledged in Cuba by an American citizen who was a resident of that country, the Court of Claims held, in the case of *Compagnie Generale Transatlantique v. United States*, 78 Fed. Supp. 797 (1948), that such children were children under the citizenship statute then in effect with regard to children born in foreign lands of an American parent, and the Court stated:

“* * * An interpretation of the citizenship statute, then, to the effect that each of these children was the ‘child’ within the meaning of the statute, of an American citizen, in no way offends the mores of this Country, and we give the statute such an interpretation. It follows that the children were American citizens. * : * *”

In *In re Wehr's Estate*, 96 Mont. 245, 29 P. 2d 836 (1934), decided by the Supreme Court of Montana, it was held that, under statute, an illegitimate child acknowledged by the father is placed

“on the same footing as a child born in lawful wedlock so far as the right of inheritance of his father's estate is concerned.”

A most interesting case to consider in connection with this phase of our case is *Estate of Wardell*, 57 Cal. 484, decided in the January 1881 term of the California Supreme Court. The case derives from the fact that a woman failed to mention her illegitimate child in her will.

The California law then (and now) authorized a woman to dispose of her property by will and she could cut off any or all of her legal heirs by her will; and it then provided by California Civil Code, Section 1307 (enacted 1872; repealed by Stats. 1931, p. 687, Cal. Prob. Code, Sec. 1700. Cf. Cal. Prob. Code, Sec. 90, enacted 1931, based on former Cal. Civ. Code, Secs. 1306, 1307, and 1309 (Deering, 1944), which incorporates generally the repealed Sec. 1307), as quoted in the *Wardell* case, *supra*, at page 490, that:

“ . . . when any testator omits to provide in his will for any of his *children*, or for the issue of any deceased *child*, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate.” (Emphasis added.)

It was found in the cited *Wardell* case, *supra*, that such omission by the testatrix did not appear to be intentional, and that “children” as used in the statute included those who would take as her heirs, even if they were illegitimate.

California Civil Code, Section 196a provides:

“The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances”³⁸

It must be conceded by all, as evidenced by the entire record in this cause, that the child in the instant cause

³⁸See, also, California Penal Code, Section 270, which provides, in part:

“A father of either a legitimate or illegitimate minor child who wilfully omits without lawful excuse to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor and punishable by imprisonment in the county jail not exceeding two years or by a fine not exceeding one thousand dollars (\$1,000), or by both.”

is and has been fully acknowledged by his father. California Probate Code, Section 255 (Appendix B), provides:

“Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be,”

See, also, California Civil Code, Section 4,³⁹ which requires a liberal construction of such statutory enactment.

The California law clearly provides the reciprocal duty of support between parent and child, and no distinction is made in the Act with respect to acknowledged children, adopted children, illegitimate children, or otherwise. California Civil Code, Section 206, provides, as follows:

“RECIPROCAL DUTIES OF PARENTS AND CHILDREN IN MAINTAINING EACH OTHER. It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessities previously furnished to such parent is binding. (Enacted 1872.)”

In codifying California law in the year 1872, the framers of the Code included the general rule of reciprocal duty of support, as between parent and child.

If, as contended by petitioner, the child must be an heir of the author in order to be a “child” within the

³⁹“RULES OF CONSTRUCTION. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice. (Enacted 1872.)”

meaning of the word "children" in the Act, then, and in such event, the following would apply:

(a) The status as to heirship would be determined by the law of the domicile of the parties, to wit, California:

(b) In California the acknowledged child is an heir of the deceased author in this cause.

In view of the fact that the renewal portions of the Copyright Act were intended to provide protection and support for the immediate family of the author, and particularly to his or her children and, further, in view of the fact that the duty of support exists in all other cases between parent and child whether the child be legitimate or illegitimate, we must be drawn to the conclusion that the word "children" as used in the Act must necessarily refer to a child who is a dependent of the author regardless of legitimacy; and, under all circumstances, the word "children" as used in the Act must include an acknowledged child who is an acknowledged dependent and heir of the author.

Conclusion.

The express language of the Copyright Act; the intention determined from the language of that Act; and the policy and purposes of the renewal portion thereof to protect the immediate family of the deceased author, all point unerringly to the determination and conclusion that the child is entitled to participate with the surviving spouse of the deceased author in the renewal privileges granted by the Copyright Act.

The judgment of the Trial Court should be sustained in its holding that the acknowledged child in this cause is a child within the meaning of the laws relating to copyright.

The judgment of the Trial Court should be reversed insofar as it excludes the child from participating in the copyrights which are renewed by the surviving spouse.

The surviving spouse, as a member of the class "widow, widower, or children" should be required to account to the child (who is the only other surviving member of that class) for the benefits already received by the spouse from copyrights renewed since the death of the author.

Respectfully submitted,

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APPENDIX "A."

TITLE 17—UNITED STATES CODE.

Sec. 24. DURATION; RENEWAL AND EXTENSION.—

The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication. July 30, 1947, c. 391, Sec. 1, 61 Stat. 652.

APPENDIX "B."

CALIFORNIA PROBATE CODE, SEC. 255.

Every illegitimate child is an heir of his mother, and also of the person, who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother's kindred, either lineal or collateral. (Stats. 1931, c. 281, p. 599, Sec. 255, as amended Stats. 1943, c. 998, p. 2912, Sec. 1.)

APPENDIX "C."

CALIFORNIA CIVIL CODE, SEC. 230.

ADOPTION OF ILLEGITIMATE CHILD. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption. (Enacted 1872.)

Key to Identification of
Amicus Curiae Briefs

<u>Brief No.</u>	<u>Title</u>
1	Motion for Leave to File Briefs as an Amicus Curiae (by Music Publishers' Protective Association, Inc.)
2	Motion for Leave to File Brief as an Amicus Curiae (by American Society of Composers, Authors and Publishers)
3	Motion for Leave to File Brief as an Amicus Curiae (Songwriters' Protective Association)
4	Motion for Leave to File Brief as Amicus Curiae (Motion Picture Association of America, Inc.)
5	Brief of Music Publishers' Protective Association, Inc., as Amicus Curiae
6	Brief for Motion Picture Association of America, Inc., as Amicus Curiae
7	Brief of Amicus Curiae, American Society of Composers, Authors and Publishers
8	Brief on Behalf of Songwriters Protective Association as Amicus Curiae
9	Memorandum for the Register of Copyrights as Amicus Curiae

SUPREME COURT, U. S.

Office - Supreme Court, U. S.
FILED
NOV 30 1955

HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 529.

MARIE DE SYLVA,

Petitioner,

—against—

MARIE BALLENTINE, as Guardian of the Estate of
Stephen William Ballentine,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AS AN
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**MOTION OF MUSIC PUBLISHERS' PROTECTIVE
ASSOCIATION, INC. FOR LEAVE TO FILE
A BRIEF AS AN AMICUS CURIAE**

The Music Publishers' Protective Association, Inc. respectfully applies to this Court for leave to file a brief as an *amicus curiae* in the above entitled proceeding, pursuant to Rule 42 (3) of the rules of this Court, on the following grounds:

1. Music Publishers' Protective Association, Inc. is a non-profit membership corporation organized and existing under the laws of the State of New York. It is a trade association of the popular music publishing industry. Its membership consists of forty five active music publishers, which include many of the foremost American publishers of popular music.

2. The interest of Music Publishers' Protective Association, Inc. in this matter arises out of the fact that this case involves the judicial interpretation and construction of a portion of Section 24 of the United States Copyright Law, Title 17, U. S. Code, said section being the section which sets forth the persons who are authorized to secure renewals of United States copyrights and the manner in which such renewals are obtained. The particular portion of the section involved provides:

"* * * That in the case of any other copyrighted work,
* * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright * * *

The question is whether, where an author is dead, this Section is to be interpreted as granting to his widow, the sole right to obtain and dispose of a renewal copyright, or whether, during the widow's lifetime, his children are in the same class with her for that purpose.

Since the members of Music Publishers' Protective Association, Inc. depend almost entirely upon the acquisition of copyrights, renewals of copyright and various exclusive rights thereunder, the vast majority of them have a vital interest in the judicial interpretation and construction of this section of the Statute.

3. The decision of the Court in the case at bar is in conflict with the decision of the Circuit Court of Appeals, Second Circuit in the case of *Silverman v. Sunrise Pictures Corporation*, 273 Fed. Rep. 909. In that case the Court held at page 911:

"The purpose of the statutory renewal provisions is to give to the persons enumerated in the order of

their enumeration a new right or estate, not growing legally out of the original copyright property, but a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty." (Italics supplied).

The "*enumeration*" set forth in Section 24 is "*widow, widower, or children*". Prior to the case at bar, music publishers acting under the Statute as it was construed in the case of *Silverman v. Sunrise Pictures Corporation, supra*, and having in mind the order of *enumeration* set forth in the Statute, concluded that where a deceased author was survived by widow and children, the right of renewal was secured to the widow alone and as a result, in many cases, obtained and have acted under exclusive assignments of renewal copyrights solely from the widow.

In this case, the Court has interpreted the Statute so as to place a widow and children in the same class, and has held in substance that if the widow renews a copyright, such renewal inures to her benefit and the benefit of the children "*as a class*". This holding would appear to grant to a child a right to renew in all respects independent of, equal to and concurrent with that of the widow. In the case of *Silverman v. Sunrise Pictures Corporation, supra* at page 914, the Court acknowledged "the right of each part or common owner to license", and there is authority for the principle that each coowner of a work has an independent right to dispose of the work. (*Edward B. Marks Music Corporation v. Jerry Vogel Music Co., Inc.*, C. C. A. 2nd, 140 Fed. 2nd 266; *Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co., Inc.*, District Court, S. D. N. Y., 73 Fed. Supp. 165.)

Accordingly, it would appear to follow that the child's right to dispose of a copyright—perhaps even one already renewed and assigned by the widow—or to license the exercise of rights thereunder would be independent of, equal to and concurrent with the right of the widow. It is

difficult to believe that Congress ever intended such a result or the consequences which would necessarily flow from it.

Furthermore, it would cause great confusion and chaos if a child now is held to possess such an independent, equal and concurrent right to dispose of a renewal copyright to an assignee of his own choosing, and it would cast a cloud on the title of the many persons who in good faith already have acquired what was believed to be an assignment of exclusive rights from a widow.

4. The decision in the case at bar, insofar as it grants to a child a right to renew a copyright independent of, equal to and concurrent with that of the widow, appears to be wholly inconsistent with the intent of Congress to create a property right "for the benefit of those naturally dependent upon or properly expectant of the author's bounty".

Because of an infant's inability to enter into a binding contract, the direct result of this interpretation, in many cases, would be to deprive the widow of the power to dispose of the renewal copyright or to grant exclusive licenses under it for the benefit of herself and her children.

The very essence of copyright is *exclusivity*, and the true value of copyright depends upon *exclusivity*. A publisher or a motion picture producer, for instance, would find little value in a work which was not his exclusively to exploit. Under the decision in this case, it would seem that a widow with infant children no longer is able to grant the renewal copyright, or a license under it, exclusively to anyone, because she can give no warranty or other assurance that a child, upon attaining majority thereafter, will not execute an independent assignment

or license to a competing publisher or user of his own selection. Such a suspension or impairment of the power of the widow, during the minority of her children, to make an exclusive grant of the renewal copyright, or rights thereunder, for the joint benefit of all, is contrary to the intent of Congress, because it serves to deprive the widow and her children of the full fruits of "the author's bounty" at a time when ordinarily they would be most needed.

The renewal copyright would become an empty shell if one child in a large family, because of his minority, should be unable to join with the others in making an exclusive grant, or having attained majority, because of improper motive, should assign the renewal copyright to his own assignee.

5. Music Publishers' Protective Association, Inc. believes the issues of fact and questions of law have not been presented by the parties, and will not be presented by the parties, in the light of facts usually and generally involved in connection with copyright renewals. The facts in this case are most unusual and the Statute has been interpreted in an unusual atmosphere involving the inherent disharmony and diversity of interest which must exist between the widow on the one hand and the mother and guardian of the illegitimate child of the deceased author on the other hand.

6. The attorney for petitioner has consented to the filing of a brief *amicus curiae* by Music Publishers' Protective Association Inc. but the attorneys for respondent have withheld their consent.

7. I am authorized by the Board of Directors of Music Publishers' Protective Association, Inc. to make this motion.

WHEREFORE, I respectfully pray that an order be made and entered herewith granting the within motion, and for such other and further relief as this Court may deem just and proper in the premises.

Respectfully submitted,

SIDNEY WM. WATTENBERG
*For Music Publishers' Protective
Association, Inc.*

PHILIP B. WATTENBERG
of New York City.
Of Counsel.

SUPREME COURT, U. S.

Office - Supreme Court, U. S.
FILED
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HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1955
No. 529.

MARIE DE SYLVA,

Petitioner,

—against—

MARIE BALLENTINE, as Guardian of the Estate of
Stephen William Ballentine,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AS AN
AMICUS CURIAE**

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

HERMAN FINKELSTEIN
575 Madison Avenue
New York 22, N. Y.
Attorney for Movant.

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MARIE BALLENTINE, ~~as~~ Guardian of the Estate of
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**MOTION OF AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS FOR LEAVE TO
FILE A BRIEF AS AN AMICUS CURIAE**

The American Society of Composers, Authors and Publishers respectfully petitions this Court for leave to file a brief as *amicus curiae* in this proceeding, pursuant to Rule 42 (3) of the rules of this Court, on the following grounds:

1. The American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society") is an unincorporated association having its principal office at 575 Madison Avenue, New York City. Its membership consists of 3111 active writer members of whom 2492 are living composers and authors, and 619 are the widows, children or other successors of deceased composers and authors. In addition, the Society's active membership includes 769 publishers. A list of the Society's members is submitted herewith.

2. The Society is engaged in licensing users of music to perform publicly for profit the respective copyrighted musical compositions of its members throughout the United States.

3. Upon the death of a writer member leaving a widow and children, the Society must name a successor to the membership in order to obtain a grant of performing rights that will enable it to continue licensing the works of that member.

4. In determining who should be named as such successor, it is necessary to ascertain who will be entitled to obtain an extension of the copyright in the member's compositions for the renewal period.

5. This determination involves an interpretation of Tit. 17 U. S. C. § 24, which it is believed is the primary question now before this Court. That section provides in part that for the period after the first term of copyright,

"* * * the author of such work, if still living, or the widow, widower or children of the author, if the author be not living * * * shall be entitled to a renewal and extension of the copyright * * *." (Italics ours.)

6. Petitioner's husband, George G. De Sylva, was a writer member of the Society from January 8, 1920 to the time of his death in 1950.

7. Upon Mr. De Sylva's death, the Society named Petitioner, Marie De Sylva, as his successor, and has been paying to her the royalties which would have been payable to her husband had he been living. She, in turn, has granted to the Society the right to license performing rights in the musical compositions of her deceased husband.

8. In naming Petitioner as such successor, the Society followed its customary practice in cases where a writer member dies leaving a widow and children, that is, it regarded the widow as the person entitled to renewal

rights in those works which may be renewed after her husband's death and during her lifetime.

9. In the event of Petitioner's death it will be necessary to name a subsequent successor (after the death of the writer and his widow). In such cases, the Society has always regarded the children, if any, as entitled to renewal rights in those works which may be renewed after the widow's death and during the lifetimes of such children.

10. This interpretation on the part of the Society reflects the unanimous opinion of the twelve writer members and twelve publisher members who constitute its Board of Directors and represent the entire membership, and it has been the consistent opinion of its counsel.

11. The Society's interpretation is supported by leading text writers. The first and most authoritative statement is that of Richard C. De Wolf, who was an attorney in the Copyright Office when the 1909 Act was passed—having entered that office in 1907—and who ultimately became Acting Register of Copyrights in 1941.* Mr. De Wolf, writing in 1925, says in "*An Outline of Copyright Law*" at pp. 65-6 (italics ours):

"The renewal can only be obtained by the beneficiaries expressly named in the law, and by them in the order named, i. e., the person having the first right is the author, if living, at the end of the original term; *if he is not living, then the widow or widower, is entitled to renew; if there is no widow or widower, the children come in; in their absence, the executor of the author's will; and finally in the absence of all other beneficiaries and the intestacy of the author, the author's next of kin are entitled to renewal.*"

This is supported by other experienced authors cited by Petitioner. The statement of Mr. George Cary, principal Legal Advisor of the Copyright Office (relied on

* Mr. De Wolf's experience in the Copyright Office is summarized by his successor in the 48th Annual Report of the Register of Copyrights (1946) p. 1.

by respondent) that the contrary "has always been the position of the Copyright Office" is not borne out by the statements of his predecessors in the Copyright Office, Mr. De Wolf (*supra*) and Mr. Herbert Howell, in *The Copyright Law* (3d ed. 1952) p. 109. See also other treatises cited by Petitioner. Opinions of the Copyright Office as such, interpreting the Act should in any event be given little weight inasmuch as the furnishing of such opinions is the function of the Attorney General, as is evidenced by an opinion already rendered on this very clause. 28 Op. Atty. Gen. 162 (Feb. 3, 1910), reprinted in 17 Copyr. Off. Bull. 254 (1928).

12. It is the position of the Society—which it believes is not adequately set forth by Petitioner—that the phrase "widow, widower, or children", having been written in the disjunctive, cannot be changed to the conjunctive through an interpretation of the Copyright Office; that if there be any doubt about whether Congress intended to permit the children to assert renewal rights as against a non-consenting widow, that doubt should be resolved in favor of permitting an author to determine by deed or will whether his children *and* the widow shall be jointly entitled to renewal rights. The decision of the Court of Appeals would not even permit an author to designate the widow in preference to his children with respect to renewals during the widow's lifetime. There is no evidence in this case that the decedent ever expressed an intent to make the child a joint owner of renewal rights together with the widow.

13. When decedent made his will, he was, as a member of the Society, presumably familiar with the customary interpretation placed on 17 U. S. C. Section 24, as set forth above, and (though it does not affirmatively appear in this record) he must have planned his estate with that in mind.

14. It would be unfortunate, in a case such as this, to upset a well-established interpretation of the law, acquiesced in by practically all of the people (writers and

publishers) for whose benefit the copyright laws are enacted, upon as skimpy a record as this case presents. This case does not involve merely the rights of the two parties before the Court; it involves the right of authors to provide for the full enjoyment of their copyrights by their widows to the extent that such widows may survive the first term of copyright; and it involves the freedom of alienation of rights by the widow after the author's death so that it will not become necessary to appoint guardians for infant children whenever an application for renewal rights is made, or whenever rights are granted to third parties for the renewal period or any part of it. Consequently, it is submitted that if this Court should find the record inadequate for a consideration of some of the questions here presented, it should hold that the courts below erred in granting declaratory relief without a full trial of the issues.

15. It is respectfully submitted that the courts should insist upon a full consideration of all pertinent facts—including the interpretation placed on the statute by professional and commercial interests over a period of a whole generation—before making an interpretation of the law that will have as far reaching effect as in the case at bar.

16. The attorneys for Petitioner have consented to the filing of a brief *amicus curiae* by the Society, but the attorneys for respondent have withheld their consent.

17. I am duly authorized by the Board of Directors of the Society to make this motion.

WHEREFORE, it is respectfully prayed that an order be made and entered herein granting the within motion, and for such other and further relief as to this Court may seem just and proper in the premises.

Respectfully submitted,

HERMAN FINKELSTEIN
For American Society of Composers,
Authors and Publishers.

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AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

575 Madison Avenue
New York 22, N. Y.

Information for ASCAP Licensees

This Membership List, periodically revised and sent to all ASCAP licensees, enables you to ascertain readily whether the performing rights in a given composition are included in your ASCAP license. This can be done by carefully checking the copyright ownership, imprinted on published copies of all musical compositions, against a list of those owners of performing rights from whom you hold licenses.

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A license of the Society is available to all users of music in public performances for profit upon relatively equal terms and conditions. Every effort is made by the Society to afford an efficient service to its licensees. The Society stands ready at all times to answer inquiries promptly, and in every consistent way to make its service as valuable to its licensees as possible.

Branch offices and local representatives exist to serve you in key cities of the Nation (see list herein). Please do not hesitate to call upon any of the Society's district or branch offices, or on the New York Office, for any information or assistance on questions involving copyright ownership.

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August 25th, 1955

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- Blane, Ralph
- *Blasco, Louis (Mrs.)
- Blaufuss, Walter (dec'd)
- Blitzstein, Marc
- Bloch, Ernest
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- *Bloom, Jack
- †Bloom, Larry
- Bloom, Milton (Mickey)
- †Bloom, Murray
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- *Blue, Gil B.
- *Bluestone, Harry
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- *Body, E. V.
- *Boeger, Robert C.
- *Bogusch, Ronald A.
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- Bonds, Margaret
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- Bonx, Nathan J. (dec'd)
- Boretz, Allen
- †Bories, Merton H.
- *Borissoff, Josef
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- Bornschein, Franz C. (dec'd)
- Borowski, Felix
- Borrelli, Jr., William
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- Bowers, Frederick V.
- Bowers, Robert Hood (dec'd)
- *Bowland, Edwin C.
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- Bowman, Brooks (dec'd)
- Bowman, Euday L. (dec'd)
- Boyer, Anita
- Boyle, George F. (dec'd)
- *Bradford, Bessie
- Bradford, James C. (dec'd)
- Bradford, John
- Bradford, Roark (dec'd)
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- Bradley, E. P.
- *Bradley, Edward
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- Brandwynne, Nat
- Branen, Jeff T. (dec'd)
- Brannum, Hugh Roberts
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- Brant, Ira
- *Brashear, Charles
- Bratton, John W. (dec'd)
- †Brau, Alexis
- *Braunbach, Helena
- Breau, Lew (dec'd)
- Breck, Carrie Ellis (dec'd)
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- *Brinkman, Paul
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- †Burton, Eldin
- Burton, Nat (dec'd)
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- *Castleton, Margery
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- Cook, Shorty (Everett)
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- Cool, Harold (dec'd)
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- Cooper, Bud
- †Cooper, Edward (Eddie)
- Cooper, Evelyné Love
- Cooper, Harvey Gilbert
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- †Cooper, Kent
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- * Cort, Mack
- Corwin, Norman
- Cory, George C., Jr.
- ‡ Coscia, Silvio (Sylvius C.)
- Coslow, Sam
- Costello, Bartley (dec'd)
- * Cotton, Hal
- Courage, A. M.
- Courtney, Alan
- † Cousins, M. T.
- Cowan, Lynn F.
- Cowan, Rubey
- Cowan, Stanley
- Cowles, Cecil
- * Cowley, John
- Cox, Lester M.
- Cox, Ralph (dec'd)
- * Coyle, John
- ‡ Craig, David
- Craig, Donald Michael
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- * Craig, Jimmy
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- Creamer, Henry (dec'd)
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- Creston, Paul
- * Creswell, John D.
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- Crooker, Earle T.
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- * Crosby, Bob
- * Crosby, Geo. H.
- * Cross, Daniel
- Cross, Douglass
- Crumit, Frank (dec'd)
- * Cummings, Margery S.
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- * Curtis, Virginia
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- Cushing, Catherine C. (dec'd)
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- * Cutter, Bob
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- * D'Alba, Jose
- * Dale, Cecil
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- * Daly, Bernard
- Daly, Joseph M.
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- ‡ Dammrosch, Walter (dec'd)
- * D'Angelo, Carlo
- * D'Angelo, Salvatore J.
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- Daniels, Charles N. (dec'd)
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- * D'Arese, Roscoe
- Darion, Joseph
- Darling, Denver
- * Darman, Arthur S.
- Darnel, Bill
- * Darnell, Shelby
- * Darsen, Frederic
- D'Artega, Alfonso
- * Daryl, Douglas
- Dash, Julian
- † da Silva, Owen Francis
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- Davenport, Charles (Cow Cow)
- Davenport, Pembroke M. (Pem)
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- David, Hal (H. L.)
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- Davis, Genevieve (dec'd)
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- †Del Busto, Angel
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- *Everett, Edgar
- *Ewing, Sarah
- *Eyre, George
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- *Fadden, Bill
- Fain, Sammy
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- Fairchild, Edgar
- *Fairfield, Frank
- Fairman, George
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- *Fall, Albert
- *Farley, Alberta
- Farley, Edward J.
- Farley, Roland (dec'd)
- †Farney, Jimmy
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- Farrar, Geraldine
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- Farrar, Walton T.
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- Farrow, Johnny
- Farwell, Arthur (dec'd)
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- Fazioli, Bernardo (dec'd)
- Fazioli, Billy (dec'd)
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- Federlein, Gottfried H. (dec'd)
- Fein, Pearl
- *Feinberg, Sam
- *Feinstein, Marlene
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- Grey, Clifford (dec'd)
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- †Grover, Arthur Buddy
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- Grunwald, Alfred (dec'd)
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- Grunn, Homer (dec'd)
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- *Hainsworth, Richard
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- *Hall, Foster
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- *Hall, Ray
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 *Jay, Vee
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 Jentes, Harry
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 *Jerome, Richard
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 *Jesrael, Adolph
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 Johns, Al (dec'd)
 *Johns, Edward
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 Johnson, Philander (dec'd)
 Johnson, William
 Johnston, Arthur (dec'd)
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 †Jones, Charles
 *Jones, Chris.
 *Jones, Clarence M. (dec'd)
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 *Jones, Gregory
 Jones, Griffith J.
 Jones, Heywood S.
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 *Jones, La Monte E.
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- Josten, Werner
- *Joy, Dorothy
- †Joy, Leonard W.
- *Juan y Dlorah
- †Junilla, Mary
- Jurgens, Dick
- Jurmann, Walter
- *Justin, Don

- Kabak, Milton
- *Kackley, Bob
- Kadison, Philip
- †Kagen, Sergius
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- Kahan, Stanley J.
- Kahn, Donald
- Kahn, Grace Le Boy
- Kahn, Gus (dec'd)
- Kahn, Marvin Irving
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- Kaiser, Roy F.
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- Kalman, Emmerich (dec'd)
- *Kalman, Erno
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- †Kane, Bernie
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- Kanner, Jerome H. (Jerry)
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- Kesnar, Maurits
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- Klauber, Marcy
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- Klein, Manuel (dec'd)
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- *Kregel, Maurice
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- Lemont, Cedric W. (dec'd)
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- *Leonard, Emil
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- *Le Roy, Margaret
- Leslie, Edgar
- *Leslie, Herbert
- *Leslie, Kermit
- *Leslie, Walter
- *Lesser, S.
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- Levant, Oscar
- Leveen, Raymond
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- Levenson, Boris (dec'd)
- Leventhal, Herbert
- *Levey, Al
- Levey, Harold
- †Levine, Abe (Al)
- †Levine, Henry
- Levine, Marks
- †Levinsky, Kermit
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- *Levinson, Jerry
- *Levinson, Robert Wells (Bob)
- *Levison, J.
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- Levy, Hal
- †Levy, Midge
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- *Lewis, Alan
- *Lewis, Ben
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- *Lewis, Dan
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- Lewis, Meade (Lux)
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- *Lewis, Morgan
- Lewis, Roger (dec'd)
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- Lewis, Jr., William M.
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- Lief, Max
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- Light, Enoch
- *Lighthill, Norman
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- Lillenas, Haldor
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- *Lind, Peter
- *Lindeman, Edith
- †Lindemann, W. C. (Bily)
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- *Lindsay, Alan
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- †Linsley, Horace
- Lippincott, David M.
- *Lippman, Bob
- Lippman, Sidney
- *Lisbona, Eddie
- Lisbona, Edward M.
- †Lissauer, Robert
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- *Lloyd, Lewellyn
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- Lockhart, Eugene
- *Locksley, Herbert
- *Lockwood, Torrence E.
- Loeb, John Jacob
- Loehner-Beda, Fritz (dec'd)
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- Logan, Fred'k Knight (dec'd)
- Logan, Virginia Knight (dec'd)
- Loman, Jules
- *Loman, Rita
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- Long, Elsie (dec'd)
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- Lord, Walter
- Lorenz, Edmund S. (dec'd)
- *Lorenz, Luther
- Lorenz, Ellen Jane
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- *Lorre, E. M.
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- *Lounsbury, Walter
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- †Love, Margaret M.
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- *Lovell, Richard
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- *Lowe, Jules
- Lowe, Ruth
- †Lowe, Samuel Milton (Sammy)
- *Lowell, J. Edgar
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- *Lyons, Frank
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- *Mack, Cecil
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 †Miller, James M.
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- Mills, Gilbert (Gil)
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- Milton, Jay
- Mineo, Samuel
- *Minnesota, Paul
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- *Mistowski, Mischa
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- Mitchell, Raymond Earle
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- Mizzy, Vic
- Mockridge, Cyril J.
- *Modini, Mona
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- *Momb, Gerda
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- Monroe, Vaughn
- *Montaine, R. A.
- Montana, Patsy
- Montani, Nicola A. (dec'd)
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- *Moon, Dorothy Wilde
- *Moon, Jack
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- *Morgan, Bruce
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- *Morton, Jelly Roll
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- Mossman, Ted
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- Motzan, Otto (dec'd)
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- *Muller, Rudi
- *Mund, E. D.
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- Mundy, John
- Murchison, Kenneth M.
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- *Murdock, John
- *Murphy, Al C.
- *Murphy, Melissa
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 *Myers, Sherman
 Myers, Stan
 †Myers, Walter
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 *Nala, Yerg
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 *Namdeerf, M. C.
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 *Nassif, Shukri
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 *Navarro, Jose
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 *Neiberg, Aaron
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 *Nolan, Kathleen
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 *Nugent, Maude
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- *Otto, J. Frank
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- Owens, Jack
- *Owens, Tommy
- *Ovett, Dayne

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- †Padwa, Vladimir
- †Paganucci, Anthony Francis (dec'd)
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- *Page, Joseph
- †Page, Jr., Milton
- Page, N. Clifford
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- *Pearse, Franklin
- Pease, Harry (dec'd)
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- †Pellish, Bert J.
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- *Penrod, Jay
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- *Perry, A. J.
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- Phillips, Burrill
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- *Phillips, Mildred
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- *Pine, Herb
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- †Pingatore, Frank J.
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- Poll, Ruth (dec'd)
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- Pollack, Lew (dec'd)
- Pollock, Bert D.
- Pollock, Channing (dec'd)
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- Ponce, Phil (dec'd)
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- *Porter, Michael
- Portnoff, Mischa
- Portnoff, Wesley
- Posnack, Blanche
- Posnack, George
- *Potter, Paul
- *Potter, William
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- Powell, Hazel Scott
- Powell, John
- Powell, Laurence
- Powell, Teddy
- *Powell, W. C.
- Powers, Maxwell
- *Prescott, Patsy
- Press, Jacques
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- Previn, Charles
- Price, Florence B. (dec'd)
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- †Price, Stephen S.
- *Price, Sybil Yvonne
- *Price, Walter
- Prima, Louis
- *Primrose, George E.
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- Priolo, Joseph Philip
- *Prior, H. R.
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- *Profitt, Josephine Moore
- *Prokoff, Alexine
- *Prokoff, Ivan
- Pryor, Arthur (dec'd)
- Puck, Harry
- *Pullen, Olive Dungan
- *Puntin, John
- *Purcell, Gilbert
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- Quadling, Lew
- Ouenzer, Arthur
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- Raab, Leonid V.
- Rachmaninoff, Sergei (dec'd)
- Radford, Dave
- *Rafael, Walter
- Rainger, Ralph (dec'd)
- Raksin, David
- Raksin, Ruby-
- Ram, Buck
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- Ramin, Sidney (Sid)
- Ramirez, Roger J. ("Ram")
- *Ramondo, Raul
- †Ramsay, E. S. (Gene)

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- *Rand, Harry
- *Randall, Peter J.
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- *Raniss, W. R.
- Rapee, Erno (dec'd)
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- †Raphling, Sam
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- Rasbach, Oscar
- Rasch, Raymond P.
- Raskin, William (dec'd)
- †Raskind, Philip
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- *Raymond, Jack
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- *Rayner, Arthur
- *Rayner, Edward
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- Read, Gardner
- *Reade, Charles
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- *Red River Dave
- Reddick, William
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- *Ree, Jennie
- †Reed, Alfred
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- Reed, David (dec'd)
- †Reed, Donald H.
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- Reed, Nancy
- Reed, Nancy Binns
- Reed, Robert B.
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- *Reeves, Leslie
- *Reginald, Lawrence
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- Reichert, Heinz (dec'd)
- Reichner, S. Bickley (Bix)
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- Reid, Don
- Reid, Reidy (dec'd)
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- Reif, Paul
- *Reimar, Hannes
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- *Rellim, Trebor
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- *Remarque, Arthur
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- Remsen, Alice
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- Rene, Jr., Otis J.
- Rene, Rafael L.
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- *Renton, Victor
- Repper, Charles
- *Retlaw, S. C.
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- *Rowell, Ethel Greenwood
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- *Royal, Ted
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- Rubens, Hugo
- Rubens, Maurie (dec'd)
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- *Salta, Enrique
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- Schelling, Ernest (Henry) (dec'd)
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- Young, Rida Johnson (dec'd)
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- Young, Victor (Standard)
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- Zabach, Florian
- Zador, Eugene
- Zamecnik, J. S. (dec'd)
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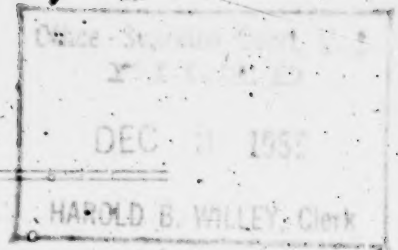
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1955
No. 529.

MARIE DE SYLVA,

Petitioner,

—against—

MARIE BALLENTINE, as Guardian of the Estate of
Stephen William Ballentine,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AS AN
AMICUS CURIAE**

SONGWRITERS' PROTECTIVE ASSOCIATION

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IN THE
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—against—

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**MOTION OF SONGWRITERS' PROTECTIVE ASSOCIA-
TION FOR LEAVE TO FILE A BRIEF
AS AN AMICUS CURIAE**

Songwriters' Protective Association respectfully applies to this Court for leave to file a brief *amicus curiae* in the above entitled proceeding, pursuant to Rule 42 (3) of the rules of this Court, on the following grounds:

1. Songwriters' Protective Association is an unincorporated association which has been in existence for upwards of twenty years. Its membership comprises more than 2500 American composers and authors of musical compositions.

2. The interest of composers and authors in the instant case stems from the fact that it involves a novel inter-

pretation and construction of Section 24 of the United States Copyright Law, Title 17, U. S. Code, which deals with copyrights and the persons authorized to secure them.

3. Until the decision in the instant case the view most prevalent amongst lawyers and laymen had been that if an author were not living when the first term of his copyright expired, the right to renew the copyright inured to his widow who took precedence over his children. This construction seemed not only logical but to have been fortified by cases such as *Silverman v. Sunrise Pictures Corporation*, 273 Fed. Rep. 909 (C. C. A. 2d Cir.).

4. In the instant case the Court has interpreted the statute as constituting the widow and children members of the same class, all entitled to participate equally in the renewal. In consequence, each member of the class is not only entitled to share in the proceeds of exploitation of the copyrighted work, but may also be authorized to grant licenses or other non-exclusive rights in respect thereof.

Your applicant respectfully submits that this construction is erroneous and illogical. But even were it a proper construction of the Copyright Law, this case should still be considered by this Court. As long as any doubts exist concerning the construction of Section 24 of the Copyright Law, myriads of copyrights presently in the renewal stage or about to reach that stage are in jeopardy. Innumerable controversies must arise concerning agreements relating to these renewal copyrights, and concerning the sharing and distribution of money derived therefrom.

This chaotic condition can be avoided only by a consideration of the problem by this Court.

5. The chaotic condition created by the instant decision is intensified by the holding that an illegitimate child stands on the same footing as one who is born in lawful wedlock. That in itself should be a basis for a consideration of the ruling below by this Court.

6. The attorney for petitioner has consented to the filing of a brief *amicus curiae* by Songwriters' Protective Association but the attorneys for respondent have withheld their consent.

WHEREFORE, it is respectfully prayed that an order be made and entered herein granting the within motion, and for such other and further relief as to this Court may seem just and proper in the premises.

Respectfully submitted,

SONGWRITERS' PROTECTIVE ASSOCIATION

By JOHN SCHULMAN

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IN THE
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No. 529

MARIE DE SYLVA,

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against

MARIE BALLENTINE, as Guardian of the Estate of
Stephen William Ballentine,

Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF AS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

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MARIE DE SYLVA,

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**MARIE BALLENTINE, as Guardian of the Estate of
Stephen William Ballentine,**

Respondent.

**On Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

**MOTION OF MOTION PICTURE ASSOCIATION OF
AMERICA, INC. FOR LEAVE TO FILE A BRIEF AS
AMICUS CURIAE**

The Motion Picture Association of America, Inc. respectfully moves this Court for leave to file a brief *amicus curiae* in this action pursuant to Rule 42(3) of the Rules of this Court. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

1. The Motion Picture Association of America is a non-profit membership organization having among its members twenty-three motion picture producing and distributing companies including the nine major motion picture

producers in the United States, namely: Allied Artists Pictures Corporation, Columbia Pictures Corporation, Loew's Incorporated, Paramount Pictures Corporation, Republic Pictures Corporation, RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corp., Universal Pictures Company, Inc., Warner Bros. Pictures, Inc.

2. The interest of the Association in this litigation derives from the fact that its members are engaged in the production and distribution of motion pictures which are based on, or include, the various forms of literary and musical material made the subject of the Copyright Act, such as books of fiction and non-fiction, magazine stories, dramatic, musical, and dramatico-musical compositions.

3. Since these works, if acquired, will at great expense be adapted for motion pictures, the producers must perforce obtain exclusive rights. Absent exclusive rights, the possibility of use by competing media of the work underlying the motion picture will, in all but a few instances, deter the acquisition of said work and its subsequent presentation to the public in the form of motion pictures.

4. These exclusive rights, in the case of renewal copyrights, must be obtained from the copyright renewer. The appropriate copyright renewer is designated in 17 U. S. C. 24,¹ the section here in issue.

5. The adversaries, as below, will have a limited interest in the interpretation of Section 24. Their briefs will be concerned with the distribution of the financial benefits resulting from the composer's creativity. The primary object of the Copyright Act, however, is "to promote the progress of science and useful arts" (U. S. Const., Art. 1, § 8). The renewal section must be interpreted with that

*** the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living *** shall be entitled to a renewal and extension of the copyright *** (Italics added.)

object in mind. Consonant therewith is the availability of exclusive rights, which encourages and make possible the widest distribution and dissemination of the work.

The motion picture is one of the forms favored by Congress for the distribution of works. This is evidenced by the copyright protection given by Congress to motion pictures.² Again, it should be noted that motion picture companies cannot be expected to purchase for film production literary, musical or dramatic works in which they cannot secure exclusive rights. This, in turn, will affect the public and the creator, the intended beneficiaries of the copyright law. It would decrease materially the adaptations which would be made available to the public and would concomitantly substantially reduce the value of the additional period of protection granted to the author's bounty.

WHEREFORE, it is respectfully urged that the Motion Picture Association of America, representing a most important media for the distribution to the public of creators' works, should be permitted to present *amicus* this issue.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF MUSIC PUBLISHERS' PROTECTIVE
ASSOCIATION, INC. AS AMICUS CURIAE**

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF MUSIC PUBLISHERS' PROTECTIVE
ASSOCIATION, INC. AS AMICUS CURIAE**

This brief is submitted by Music Publishers' Protective Association, Inc. as *amicus curiae* pursuant to leave granted by this Court on the 9th day of January, 1956.

Interest of Amicus Curiae

The Music Publishers' Protective Association, Inc. is a non-profit membership corporation organized and existing under the laws of the State of New York. It is a trade association of the popular music publishing industry. Its membership consists of forty-five active music publishers, which include many of the foremost American publishers of popular music.

The interest of Music Publishers' Protective Association, Inc. in this matter arises out of the fact that this case involves the judicial interpretation and construction of a portion of section 24 of the United States Copyright Law, Title 17, U. S. Code, said section being the section which sets forth the persons who are entitled to renewals and extensions of United States copyrights and the order in which such persons take. The particular portion of the section involved provides:

"* * * That in the case of any other copyrighted work * * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright * * *"¹

The main question presented for decision is whether, when an author is dead, this section is to be interpreted as granting to his widow, the sole right to obtain and dispose of and grant licenses under a renewal copyright, or whether, during the widow's lifetime, his children have rights equal to and concurrent with the rights of the widow in that respect.

The Court below has interpreted the statute so as to place a widow and children in the same class, and has held in substance, that if the widow renews a copyright, such renewal inures to her benefit and the benefit of the children "as a class". This holding would appear to constitute the widow and child co-owners or tenants in common.

The right of each part or common owner of a copyrighted work to license has been recognized (*Silverman v. Sunrise Pictures Corporation*, C. C. A. 2nd, 1921, 273 Fed. Rep. 909), and there is authority for the principle that

¹ Section 24 of Title 17 U. S. Code in its entirety follows this brief as Appendix A.

each co-owner of a work has an independent right to dispose of the work. (*Edward B. Marks Music Corporation v. Jerry Vogel Music Co., Inc.*, C. C. A. 2nd, 1944, 140 Fed. 2nd 266; *Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co., Inc.*, District Court, S. D. N. Y., 1947, 75 Fed. Supp. 165.)

Accordingly, it would appear to follow that under the decision below a child's right to dispose of a copyright—even one already renewed and assigned by a widow—or to license the exercise of rights thereunder, would be independent of, equal to, and concurrent with the right of such widow.

The consensus of opinion among the vast majority of publishers, authors and copyright attorneys always has been to the contrary—namely, that an author's widow has the sole right to renew and dispose of a copyright coming due for renewal during her lifetime.

Since the members of Music Publishers' Protective Association, Inc. depend almost entirely upon the acquisition of copyrights, renewals of copyright and various exclusive rights thereunder, all of them have a vital interest in the judicial interpretation and construction of this section of the statute. In a great many cases, publishers, in good faith, and, in reliance upon advice of counsel and the generally accepted interpretation of the statute, have acquired renewals of United States copyrights from widows of deceased authors, and the very nature of the publishing business makes it essential that publishers continue to negotiate for and acquire such renewals.

A second question presented by this case is whether the word "children", as it is used in the statute, includes an illegitimate child.

The judgment and decision of the United States Court of Appeals, Ninth Circuit, therefore, affects practically

every type of publisher of every type of music with respect to a most important, if not indeed vital phase of their business.

At this point counsel wishes to call to the attention of this Court the following facts. Two members of Music Publishers' Protective Association, Inc., the *amicus curiae* herein, namely, Shapiro, Bernstein & Co., Inc. and Crawford Music Corporation², have an interest in the outcome of this case, as hereinafter will more fully appear. Furthermore, in addition to being general counsel for Music Publishers' Protective Association, Inc., counsel wishes to point out that his firm represents Crawford Music Corporation, T. B. Harms Company and Music Publishers Holding Corporation, hereinafter referred to.

Summary of Argument

The grant of renewal rights contained in section 24 of the Copyright Law to a deceased author's "widow, * * * or children" constitutes an absolute grant to the widow of any renewal copyright accruing during her lifetime, and a contingent or substitutional gift to the children in the event there is no widow.

This conclusion is made clear from a study of the historical development of copyright legislation in this country.

This conclusion is supported by judicial interpretations of similar language.

² By Certificate of Change of Name dated the 11th day of October, 1951 and filed in the office of the Secretary of State, Albany, New York on the 15th day of October, 1951, the name of Crawford Music Corporation was changed to DeSylva, Brown & Henderson, Inc. The inclusion of the name DeSylva in the name of said corporation is wholly without significance; petitioner does not own or control, either directly or indirectly, any proprietary or other interest whatsoever in the said corporation.

The grant of copyright renewal rights to a widow to the exclusion of the author's children is entirely consistent with general Federal legislative policy, which in statutes dealing with death and similar benefits, gives precedence to widows over children.

The interpretation of section 24 by the Court below is entirely inconsistent with obvious legislative intent in that it is contrary to the best interests of the author and his family.

The interpretation of the statute by the Court below is contrary to the basic concept upon which all copyright legislation is based in that it tends to break down and destroy exclusivity, the essential element upon which copyright necessarily depends.

Music publishers, authors and composers uniformly have interpreted the statute as securing to the widow the renewal right to the exclusion of children, and they have been fortified in such interpretation by the great weight of authorities who have expressed themselves on the subject.

Music publishers, authors and composers have acted in accordance with this interpretation of the statute; music publishers, in a great many instances, have dealt with widows and have actually entered into agreements in good faith with widows under the assumption that they were obtaining exclusive rights from them.

The interpretation by the Court below of the word "children", as it is used in the statute, so as to include illegitimate children virtually places a cloud upon the renewal rights of not only widows but also the legitimate children of all authors, because no assignee or licensee of such persons can be certain that the title he has taken from them will not be attacked by one claiming through an illegitimate child theretofore unknown.

The decision below which grants to the children of a deceased author a renewal right equal to and concurrent with that of the widow, and which in addition, treats an illegitimate child as legitimate for such purpose, will result in chaos and confusion in the industries which deal with copyrighted works.

ARGUMENT

I

The sequence of words "widow, widower, or children of the author" in Section 24 must be so construed as to grant to the author's widow the renewal and extension of a copyright which comes due for renewal during her lifetime to the exclusion of children.

A. The Statute and its Development

The language of the statute should be given its natural and ordinary meaning. There does not appear to be any reason to place a strained interpretation upon it. The Congress saw fit to use the word "or" which generally indicates the disjunctive, whereas, had it intended to secure the right of renewal equally to the widow and children, it would have been logical for Congress to have used the word "and".

This is borne out by a consideration of the legislative history of the renewal provisions in the United States.

The original copyright act in the United States was enacted by the second session of the first Congress in 1790. It provided for a double term and the distribution of the renewal rights of the author, upon his death, to his "executors, administrators or assigns" (Section 1 of the Act of May 31, 1790 (First Congress, Second Ses-

sion, Chapter 15), reprinted in Copyright Enactments of the United States, compiled by Thorvald Solberg, Register of Copyrights, Copyright Office Bulletin No. 3, Second Edition, Revised, at page 32.)

Thereafter, for the forty year period between 1790 and 1831 an author could pass by will his right of renewal to any person named by him as legatee. He was not, in any way, restricted in his choice of legatee.

In 1831 the law was changed and section 2 of the Copyright Act of February 3, 1831 provided:

"* * * That if, at the expiration of the aforesaid term of years, such author, inventor, designer, engraver, or any of them, where the work had been originally composed and made by more than one person, be still living, and a citizen or citizens of the United States, or resident therein, or, being dead, shall have left a widow, or child, or children, *either or all then living*, the same exclusive right shall be continued to such author, designer, or engraver, or, if dead, then to such *widow and child, or children*, for the further term of fourteen years: * * *" (Italics supplied)

(Section 1 of the Act of February 3, 1831 (Twenty-First Congress, Second Session, Chapter 16), reprinted in Copyright Enactments of the United States, compiled by Thorvald Solberg, Register of Copyrights, Copyright Office Bulletin No. 3, Second Edition, Revised, at page 37.)

The Act of 1831 provided for, what may with justice be denominated a "forced legacy". It protected the author's family against the improvident disposition of the renewal rights by the author's will. It was undoubtedly mean to be understood as "* * * such widow and child" or "such widow and children. * * *"

This renewal provision remained unchanged until the Act of 1870 which provided for renewals of copyright

in a new section pointedly rewritten in several particulars. Section 88 of that Act read.

" * * That the author, inventor, or designer, if he be still living, and a citizen of the United States or resident therein, or his *widow or children*, if he be dead, shall have the same exclusive right continued for the further term of fourteen years, * * * " (Italics supplied).

(Section 88 of the Act of July 8, 1870 (Forty-First Congress, Second Session, Chapter 230), reprinted in Copyright Enactments of the United States, compiled by Thorvald Solberg, Register of Copyrights, Copyright Office Bulletin No. 3, Second Edition, Revised, at pages 46-47.)

The language of the Act of 1870 retained the so-called forced legacy provision for the deceased author's family, but very conspicuously omitted the important phrase "** * * either or all then living * * **", reemphasizing the change intended by this omission by designating the members of the family who were to receive the renewal rights upon the author's death as the "** * * widow or children * * **".

There has been no relevant change in the phraseology of the renewal provision since 1870; and as aforesaid the current law, the Act of 1909, secures the renewal right to the "widow, widower, or children".

The key to the correct interpretation of the current statutory language is to be found in a comparative rereading of the phraseology found in the renewal provisions of the Acts of 1790, 1831 and 1870. Each of these Acts must be considered part of a continuous growth of Congressional policy.

The Act of 1790 provided in effect that an author might dispose of his renewal rights by will. The Act of 1831 provided in effect that these renewal rights went to the

widow *and* children of the author, regardless of his will. The Act of 1870 completed the process by providing that the forced legacy went to the author's widow *or* children.

The transition from "and" to "or" can not be interpreted as a mere matter of chance. That a deliberate change in policy was intended by the substitution of "*or*" for "*and*" is corroborated by the simultaneous omission from the Act of 1870 of the phrase "*either or all then living*".

The use of the word "and" plus the clause "*either or all then living*" indicates a grant of the renewal right to those persons then living *as a class*. The 1870 Act which dropped the words "*either or all then living*" and changed the conjunctive "*and*" to the disjunctive "*or*" constitutes an absolute grant to the widow, or if there be no widow, then a substitutional grant to the children. The 1909 Law, which still is in effect, continued the use of the disjunctive "*or*". (See Appendix A.)

That the substitutional gift was intended to replace the gift to the class in 1870 by this deliberate change in phraseology of the forced legacy renewal provision, is made extraordinarily clear when we look to the construction of this phraseology in other situations, for once we have interpreted the phrase "*widow or children*" correctly, the omission of "*either or all then living*" appears a necessary concomitant.

B. The Meaning of "Widow or Children"

Similar language has been construed judicially before. In the case of *Addison v. New England Commercial Travelers Association* (1887), 144 Mass. 591, 12 N. E. 407, the Supreme Judicial Court of Massachusetts was called upon to construe an application for a life insurance policy. In the application, where information was requested as to

the name or names of the beneficiaries, the applicant had stated "my wife *or* my daughters".

The Court held at page 593 that:

"* * * the meaning is sufficiently plain that he intended the payment should be to his widow, or, if he left no widow, to his surviving daughters. This is the natural meaning of the language * * *"

In the case of *Bender v. Bender* (1910) 226 Pa. 607, 75 A. 859, 134 Am. St. Rep. 1088, the will contained a devise to "Johannes Bender or his children". The lower Court had construed the word "or" as "and", but on appeal it was held at pages 611 and 612:

"Clearly this was a case where the learned court fell into serious error through attempting to construe something which did not call for construction * * *. In grammatical construction the devise is entirely correct; and it is so definite in expression and terms that but one meaning can be derived from it. It points unmistakably to an alternative gift and with equal certitude to the intended alternate beneficiary. * * * the devise imports a substitutional gift to provide against a possible failure of Johannes to take."

In the case of *Carlin v. Helm* (1928) 331 Ill. 213, 162 N. E. 873, the Court construed a will containing a bequest to "* * * Aura F. Hecox and her children * * *". In that case the Court distinguished between the use of the word "and" which would have indicated a tenancy in common and the word "or" and held at pages 223 and 224:

"If the words 'and her children' be read 'or her children' the meaning of the testator is as contended for and the children are to be substituted in the event of the death of their mother. But that is not the question presented. The authorities cited in support of a construction favoring the substitution of 'or' for 'and' are not applicable here. Courts may construe, but are not permitted to make, wills."

Similarly, in the case of *Talc v. Amos* (1929) 197 N. C. 159, 147 S. E. 809, the testator gave his lot "To Grace Darling Winend Hendrick * * * or to her children * * *". The question presented to the Court was whether Mrs. Hendrick took a fee simple or was to be considered a tenant in common with her children. The Court in holding that she took a fee simple stated at pages 161 and 162:

"Appellants, defendants, contend (first) that in the construction of the will 'or' means 'and' and the lot in controversy would vest in Grace Darling Winend Hendrick and Charlie Thomas Hendrick, Jr., as tenants in common.

This court uniformly held that a devise to A. and her children, A. having children, vests the estate to them as tenants in common. * * * After providing for the son, she devises the lot in controversy to Mrs. Hendrick *or to her children*. We think the principle applicable here is well stated in 1 Jarman on Wills, p. 612, as follows: "The strong tendency of the modern cases certainly is to consider the word 'or' as introducing a substituted gift in the event of the first legatee dying in the testator's lifetime; in other words, as inserted, in prospect of, and with a view to guard against, the failure of the gift by lapse." (Italics supplied)

It appears to be well settled indeed that a testamentary disposition to a given person "or his children" gives to the children a gift only by substitution upon the death of the given person and that the word "or" is not to be construed interchangeably with the word "and" in this connection. (*Schaeffer's Adm'r. v. Schaeffer's Adm'r.* (1903), 54 W. Va. 681, 46 S. E. 150; *Rolf's and Leising's Guardian v. Frischolz' Executor* (1933), 251 Ky. 450, 65 S. W. 2d 473; *Early v. Taylor* (1941), 219 N. C. 363, 13 S. E. 2d 609; *Penley v. Penley* (1850), 12 Beav. 547, 50 Eng. Reprint. 1170.)

The phrase "widow or children", therefore, can be interpreted in only one way, namely, a grant to the

widow if she is alive, and a grant to the children, only in the event that she is not alive. This obviously is the reason why the words "*either or all then living*" were stricken from the Copyright Statute in 1870.

Section 24 of the Copyright Statute was considered by the Circuit Court of Appeals, Second Circuit in the case of *Silverman v. Sunrise Pictures Corporation* (*supra*), 273 Fed. Rep. 909. In that case the Court held at page 911:

"The purpose of the statutory renewal provisions is to give to the persons enumerated in the order of their enumeration a new right or estate, not growing legally out of the original copyright property, but a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty." (Italics supplied)

Since the order of enumeration set forth in section 24 is "widow, widower, or children" it would seem clear that the rights in a copyright coming due for renewal after the death of the author, but during the lifetime of his widow, inure exclusively to the widow, and that the children of the author do not acquire any right of renewal with respect thereto.

As will later be pointed out in more detail, the music publishing industry always has interpreted the statute as granting to the widow of a deceased author a right prior to and exclusive of that of the children of such an author. Publishers regularly have conducted their business and acted upon such an interpretation, and needless to say, the holding of the Court in the case of *Silverman v. Sunrise Pictures Corporation* (*supra*), as well as other authorities hereinafter cited, did much to fortify publishers in such an interpretation of the statute.

II

An interpretation of Section 24 of the Copyright Law which grants to the widow a right of renewal having precedence over the right of children is consistent with general legislative policy which has resulted in the widow usually taking precedence over children in federal legislation.

Congress, on numerous occasions has enacted legislation dealing with the distribution of death and other benefits. It must be assumed that various methods of distribution were considered in each case, and, therefore, it is noteworthy that Congress repeatedly has conferred these benefits on the widow to the exclusion of the surviving children of a deceased.

For instance, in providing for the payment of the accrued compensation of deceased members of Congress, Congress provided that such compensation shall go to the widow. (Title 2 U. S. C. A. 1955 Supp., Sections 36a (Senate) and 38a (House)).

The allowance payable on the death of an army or air force officer is granted to the widow. (Title 10 U. S. C. A. 1955 Supp., Section 903)

These examples clearly show that as between a widow and children, the first concern of Congress is the widow and any provision for the benefit of children is purely secondary.

On innumerable other occasions, Congress in legislating on the subject of the distribution of death benefits, has provided that the surviving spouse shall take precedence. (Pay and Allowances, Title 37 U. S. C. A. Supp., Section 362; Pensions, Bonuses and Veterans' Relief, Title 38

U. S. C. A. Sections 96, 191, 661, 691d, 739(a)(2), 802(h)(3), 852; Public Lands, Title 43 U. S. C. A. Sections 278 and 280 (1955 Supp.); Railroads, Title 45 U. S. C. A. Section 228e(f)(1)

Title 37 (Pay and Allowances), Section 35 (a) (2) (i) and Section 35 (b) (i) appear to be the only similar sections in the U. S. Code which provide for the children of the deceased taking an interest concurrent with that of the surviving spouse. These sections read respectively, "(i) to such holder's surviving spouse and children, if any, in equal shares; * * *"; and "(i) to such member's or former member's surviving spouse and children, if any, in equal shares;".

It is indeed significant that in these cases not only did Congress use the word "and" but in addition set forth specifically the share which each should take.

Section 24 of the Copyright Law has no indication as to the proportions in which "widow or children" should share. The Court below has interpreted this section as providing that the widow and children are members of the same class. This in effect is a judicial interpolation of an intestacy statute into the Copyright Law where one was not intended. Can it be said that if an author dies leaving a widow and one child each would take a half interest in his renewal copyrights, whereas if the author had left nine children, the widow and each child would receive only a tenth interest in such renewal copyrights? Could Congress have intended such an absurdity? It is submitted that such an interpretation is both unrealistic and unreasonable, and yet the decision of the Court below construed the law in just that way. In effect it designates the child and the petitioner tenants in common, presumably granting to each a half interest in the renewal rights of the author. Had there been nine children instead of just the one, would the widow, as one of ten tenants in common, have had her share reduced to one tenth, or would some other proportion have to be established by judicial decree?

III

To effectively give meaning to the obvious intent of the statute it must be construed as giving to the widow the sole right to a renewal copyright coming into existence during her lifetime.

The Constitution of the United States is the authority under which all copyright legislation is enacted, and in the light of which all copyright legislation must be construed.

Article I, Section 8 grants to Congress in Clause 8 the power

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries." (Italics supplied)

The Constitution, therefore, makes two things clear. First, that the basic purpose is to promote the progress of science and the useful arts. In order to accomplish this there must be secured to inventors and scientists adequate compensation and reward for the fruits of their labors to provide them with incentive and livelihood. The second thing that the Constitution makes clear is the method by which such a result is accomplished, namely, "by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries." (Italics supplied) As was set forth in Committee Report (number 2222) on the Bill enacting the Copyright Act of 1909 reprinted in "The Copyright Law", Third Edition by Herbert A. Howell, page 253, at page 260:

"It will be seen, therefore, that the spirit of any act which Congress is authorized to pass must be one which will promote the progress of science and

the useful arts, and unless it is designed to accomplish this result and is believed, in fact, to accomplish this result, it would be beyond the power of Congress."

Therefore, in considering questions involving copyright, two things must be borne in mind. One, that the purpose of the legislation is to create a property right of substantial value for the benefit of the author, and second, that this is to be done by granting to him exclusive rights in his work.

The very essence of copyright, therefore, is exclusivity and the inherent value of copyright depends upon exclusivity.

The framers of our Constitution recognized the necessity for exclusivity because of the nature of the type of works involved. In order that a literary, musical or other artistic work may be exploited and presented to the greatest advantage of the author, the right to exploitation and presentation must be secured wherever possible to a single entity.

No music or book publisher would be willing to invest as much time, effort and money in the publication and exploitation of a work which was not his exclusively to publish and exploit as one in which he did have exclusive rights. Likewise, no theatrical producer would be inclined to invest a great deal of money and time in the presentation of a play if there was a likelihood or even a possibility of a competing producer presenting the same play simultaneously.

The construction of the statute by the Court below tends to destroy exclusivity, because it strips the widow of the sole right to assign the property or to grant an exclusive license permitting its use. In fact, the decision of the Court below already has had an actual effect upon the exclusivity of rights in the works of B. G. DeSylva.

As *amicus curiae* we respectfully submit that this Court should know the following circumstances:

On the 26th day of September, 1946 the said B. G. DeSylva entered into two separate agreements, one with Crawford Music Corporation and the other with T. B. Harms Company, publishers of his own choosing, pursuant to which he assigned the renewal rights in a great many musical compositions written in whole or in part by him to such publishers, and his wife Marie DeSylva, the petitioner herein, joined in both said agreements and assignments.

These agreements were recorded in the office of the Register of Copyrights in Washington, D. C. on or about November 15, 1946 in volume 614 pages 53 through 71 (both inclusive).

Inasmuch as these agreements have been so recorded, and as a result thereof, have become public records, we respectfully ask the Court to take judicial notice of them and their contents.

The said agreement with Crawford Music Corporation is annexed hereto as Appendix B. The said agreement with T. B. Harms Company is annexed hereto as Appendix C. The joining of Marie DeSylva in said agreements appears from Exhibits B attached thereto.

On the 26th day of September, 1946 B. G. DeSylva entered into an agreement with Music Publishers Holding Corporation, a publisher of his own choosing, pursuant to which he assigned the renewal rights in a great many other musical compositions written in whole or in part by him to Music Publishers Holding Corporation, and his wife Marie DeSylva, the petitioner herein, also joined in the said agreement and assignment by simultaneously entering into a concurrent agreement.

The said agreements were recorded in the Office of the Register of Copyrights in Washington, D. C. on the

7th day of January, 1947 in volume 617, pages 202 through 215. Inasmuch as these agreements have been recorded and as a result thereof have become a public record, we respectfully ask the Court to take judicial notice of them and their contents.

The said agreements with Music Publishers Holding Corporation are annexed hereto as Appendix D.

Subsequently in March of 1947 B. G. DeSylva and his wife Marie DeSylva, the petitioner herein, entered into an agreement with Shapiro, Bernstein & Co., Inc., another publisher selected by the said B. G. DeSylva, pursuant to which they assigned to that publisher other musical compositions written in part by DeSylva.

This agreement was recorded in the Office of the Register of Copyrights on the 13th day of June, 1952 in volume 635, pages 189-190, and in view of the said recording, we respectfully ask the Court to take judicial notice of it and its contents.

The said agreement with Shapiro, Bernstein & Co., Inc. is annexed hereto as Appendix E.

The aforementioned agreements all were entered into in good faith and for very substantial and valuable considerations, which the respective publishers paid or agreed to pay to B. G. DeSylva (or his wife) relying upon their assumption that there could be no inconsistent or competing claim asserted by any child to the DeSylva renewal copyright interests.

The actual consideration for the agreement made with Shapiro, Bernstein & Co., Inc. (Appendix E) appears upon the face of that agreement. The extent of the considerations for the agreements made with Crawford Music Corporation, T. B. Harms Company and Music

Publishers Holding Corporation is not recited in the said agreements and does not appear from them.³

The purpose of these agreements was to vest in the respective publisher-assignees the exclusive renewal copy rights in each of the works set forth, subject to the payment of substantial royalties by said publisher.

Notwithstanding this fact, no sooner had the Court below published its decision, than the respondent as guardian entered into an agreement with a competing publisher pursuant to which the guardian purported to assign to such competing publisher all the right, title and interest of her ward in the aforementioned United States renewal copyrights. The aforementioned agreement was submitted to and approved by the Superior Court of the State of California in and for the County of Los Angeles and was filed in the office of the County Clerk on December 29, 1955, and in view of such filing the said agreement now is a public record and as such, we respectfully ask the Court to take judicial notice of it.

A copy of the said order which includes said agreement is annexed to this brief as Appendix H.

³ A portion of the valuable considerations which Crawford Music Corporation, T. B. Harms Company and Music Publishers Holding Corporation actually agreed to pay to B. G. DeSylva (or his wife) in connection with the agreements (Appendices B, C and D), appears in separate agreements, which counsel hesitates making reference to in the body of this brief because said separate agreements were not recorded in the United States Copyright Office. However, in order that this Court may know the facts, these separate agreements, although unrecorded, are attached to this brief. The separate agreement with Crawford Music Corporation and T. B. Harms Company is Appendix F and the agreement with Music Publishers Holding Corporation is Appendix G. The Court may wish to note therefrom that the said agreements required the payment to DeSylva (or his wife) of an aggregated amount of not less than \$70,000.00 (in yearly installments) during the 10 year period commencing October 1, 1946.

• It must be pointed out that insofar as B. G. DeSylva and his wife were concerned, each of these several agreements was intended to grant and assign only to the particular publisher named therein, the exclusive ownership of the renewal copyrights of certain specified musical compositions.

• One of our purposes in calling the Court's attention to these facts is to demonstrate the manner in which exclusivity in these important works will be destroyed with the inevitable result that their value also must necessarily be destroyed or greatly diminished.

• It must be borne in mind that B. G. DeSylva was a very talented and famous author, and that his works have become very valuable. They have attained a popularity which is not likely to fade, but is more likely to continue. This is unquestionably the reason why a second publisher was willing to acquire a non-exclusive right in these works, for he was actually doing nothing more than buying an interest in an established property of proven worth.

Despite the value of the DeSylva works, the destruction of the exclusivity will have harmful effects upon them although they may not be destroyed completely.

However, in the case of works of lesser importance, the destruction of exclusivity must result in the complete destruction of their value.

It has been held that the renewal copyright constituted "a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty". (*Silverman v. Sunrise Pictures Corporation, supra.*) To effectively grant a right of substantial value to the natural objects of the author's bounty, Congress must have intended that the right be secured to the widow during her lifetime, to the

exclusion of the children, for it is in that way that the work may most easily be disposed of and the full benefits thereof most readily reaped.

In the vast majority of normal cases it is the widow, who, after the death of the author, becomes the head of the family, and upon whom rests the burden of rearing and supporting the children of the author. For that reason, in order to carry out the obvious intention of Congress, the statute must be construed so as to grant to the widow the exclusive right in the renewal copyright and the exclusive right to dispose of and capitalize on such renewal copyright and the subject matter thereof.

The decision of the Court below tends to affect adversely the marketability of the renewal copyright after the death of the author and to decrease substantially the financial benefits which ordinarily would flow therefrom to the family unit.

The inability of an infant to enter into a binding contract is universally recognized. Therefore, where a widow is left with infant children she could not assign a copyright exclusively to a publisher or other user, nor could she grant any exclusive license under such a renewal copyright because she could give no assurance that her infant children, upon attaining majority, would not give their own assignments or licenses to competing publishers or users of their own choosing.

It might be argued that in such a case the infant child could act through a guardian. But the appointment of a guardian in each such case would be both costly and cumbersome.

The factual situation in the current case is unique in several important particulars and has tended to present the questions for decision in a misleading setting. This case involves the inherent lack of harmony which must

exist between a widow and the mother of her husband's illegitimate child. In the vast majority of cases which confront music publishers the widow and children of a deceased author live in harmony and normal family relationship. Nevertheless, the widowed mother could be prevented from effectively disposing of the renewal copyrights for her own benefit and the benefit of her children because of the inability of such children to enter into binding agreements.

The renewal copyright would become an empty shell if one child in a large family, because of his minority, should be unable to join with the others in making an exclusive grant, or having attained majority, because of improper motive, should assign the renewal copyright to his own assignee.

Thus the decision of the Court below has the effect of depriving the widowed mother with infant children, and the children themselves, of the full benefits of renewal copyrights—benefits which Congress obviously intended they should have—at a time when they probably would be most needed.

A construction of the statute which would recognize the widow, during her lifetime, to the exclusion of the children would not work a disinheritance of the children, because the interpretation contended for would grant to the widow renewals of only those copyrights which came due for renewal after the death of the author and during her lifetime. Any copyright renewable after the death of the widow would be renewable by the children as the persons next in the "order of enumeration" set forth in the statute.

The interpretation contended for by respondent would schematically grant much greater proportionate benefits to the children than to the widow. In other words, under

the respondent's interpretation of the statute, in all cases where there was one or more children, *each child* would share at least equally with the widow in the benefits stemming from those renewal copyrights accruing during the lifetime of the widow.

IV

The interpretation of Section 24 of the Copyright Law which grants to an author's children rights in renewal copyrights equal to and concurrent with the rights of the widow in that respect, is distinctly contrary to the best interests of the author himself.

As the Attorney General stated in his opinion of February 3, 1910, 28 Op. Atty. Gen. 162, 169 in discussing the right of renewal:

"At any rate, the right of extension was clearly given for the benefit of the author, and the provision should ~~not~~ be construed against him unless the language of the statute clearly requires such construction, which it does not."

In discussing the right of an author to assign his contingent renewal rights Mr. Justice Frankfurter in the case of *Fred Fisher Music Co., Inc. et al. v. M. Wadmark & Sons* (1943), 318 U. S. 643, 657 stated:

"If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need."

The extent to which these principles apply to the facts in the case at bar is apparent. As heretofore set forth, B. G. DeSylva, the author in this case, entered into agreements with various publishers selected by him on the 26th day of September, 1946 and in March of 1947 pursuant

to which, for substantial and valuable considerations, he assigned to each of them his exclusive rights of renewal in the particular musical compositions referred to in each such separate agreement. It was a simple matter for DeSylva to have his wife join with him in all those transactions.

At that time the respondent's ward was five or six years of age. It would not have been simple, even if it were at all possible, to obtain a binding commitment from the infant.

The publishers were willing to enter into the agreements with DeSylva because they assumed that they were reasonably certain of acquiring thereby the exclusive DeSylva rights. It appeared that if the author himself lived and became vested with the right to renew copyrights, which right at the time was merely contingent, they, the publishers, would acquire said renewal rights directly from the author.

Additional security was provided by the joining of the author's wife in said agreements in view of the assumption that if the author died before the right of renewal accrued, his wife as widow would succeed to the exclusive renewal right.

Under the decision of the Court below, however, the widow's right is merely non-exclusive because of the interpretation placing the child and widow in the same class. Accordingly, it would not have been possible for the author himself, even with his wife, to have granted to the publisher a complete, marketable title to the renewal copyrights.

Hence, it becomes clear that the decision below adversely affects the interests of authors themselves. As an author grows older and desires to realize the benefits which can ordinarily be obtained from the assignment

of his renewal rights, any factor which adversely affects the marketability of his title or renders more difficult his disposition of his rights, is to be frowned upon. Most certainly the same reasoning applies to the author's widow with equal force.

V

Since the passage of the Copyright Law, publishers and authors have interpreted the statute as giving the widow an exclusive right with respect to renewals accruing during her lifetime, and have acted accordingly.

The statute before the Court was enacted in 1909.

The language of section 24 appeared clear in that the renewal right of a widow preceded and was exclusive of the right of children.

On February 3, 1910 the Attorney General of the United States, in an opinion construing the effect of this section, stated that the extension or renewal is to be "procured by the author, if living, or if dead, by the persons, and in the order mentioned in the preceding section". (28 Op. Atty. Gen. 162 *supra*.)

Thereafter, and in 1921, the Court of Appeals, Second Circuit, judicially interpreted section 24 in the case of *Silverman v. Sunrise Pictures Corporation*, *supra*, and stated that the renewal provisions "give the renewal right to the persons enumerated in the order of their enumeration". (Italics supplied.)

In 1925 Richard C. DeWolf, an attorney attached to the United States Copyright Office when the statute in ques-

tion went into effect, in his "An Outline of Copyright Law" stated at pages 65 and 66:

"The renewal can only be obtained by the beneficiaries expressly named in the law, and by them in the order named, i. e., the person having the first right is the author, if living, at the end of the original term; *if he is not living, then the widow or widower, is entitled to renew; if there is no widow or widower, the children come in; in their absence, the executor of the author's will; and finally in the absence of all other beneficiaries and the intestacy of the author, the author's next of kin are entitled to renewal.*" (Italics supplied.)

It was only reasonable that because of the language of the statute itself, and because of the interpretations of this language given by such authorities, authors and publishers assumed that the renewal right secured to the widow had precedence over any such right in the children.

A strong indication of this assumption appears in one of the most recent copyright cases heard by this Court, *Fred Fisher Music Co., Inc. v. M. Witmark & Sons (supra)*. In that case both parties were represented by some of the foremost copyright attorneys of the day. It is significant that in their briefs, both sides conceded that upon the author's death, the widow alone succeeded to the right of renewal. The attorneys for the petitioners in that case stated at page 25 of their brief:

"No purchaser could logically be expected to pay full value for property which he may never receive. The purchase price must be diluted by the contingency that the seller might not survive to file the application and deliver the renewal. If the author's wife be joined in the conveyance, the title is still not complete. *She may fail to survive and the right will pass to the children free of the claims of the purchaser.*" (Italics supplied.)

The attorney for the respondent in that case stated at page 5 of his brief—

“Under this statutory scheme, the author, *and the widow and children in their turn*, have a contingent right in the renewal term.” (Italics supplied.)

As a matter of fact, this honorable Court in deciding that case, appeared to make the same assumption, for in footnote 2 to the majority opinion delivered by the Court, Mr. Justice Frankfurter stated,

“2 Ball and Olcott were no longer living at the time and under sec. 23 of the act their interests in the renewal passed to their widows.”⁴

Ernest R. Ball and Chauncey Olcott, referred to by Mr. Justice Frankfurter, were well known composers and the music industry knew that each of them had at least one child then living. Accordingly, this footnote further fortified the industry in its interpretation of the statute to the effect that the widow's renewal rights were prior to and exclusive of those of children.

That the statute was given the same interpretation by the motion picture industry twenty years before the case of *Fred Fisher Music Co., Inc. v. M. Witmark & Sons* (*supra*) is apparent from the brief filed in this Court in behalf of Fox Film Corporation in the case of *Fox Film Corporation v. Knowles et al.* (1923), 261 U. S. 326. In that case which involved the right of an executor to renew a copyright, the author having died leaving neither a widow nor children surviving him, petitioner stated at page 19 of its brief:

“If, to these arguments, it be answered that the widow and children receive the right to renewal not in any way through the author but by a pure statutory grant

⁴ The former section 23 referred to by Mr. Justice Frankfurter in the footnote to his opinion, became section 24 by the Act of July 30, 1947, c. 391 § 1, 61 Stat. 652.

upon the beginning of the year, it may be answered that executors being enumerated with widows and children in the statute, likewise receive the renewal rights at the prescribed time, the only condition being that the widow and children are preferred *in their order.*" (Italics supplied.)

In view of this interpretation of the statute, which over the years has become accepted almost universally, music publishers have entered into countless agreements with widows for the assignment of contingent renewal rights. As a rule these agreements provide that the publisher may renew the copyright as attorney-in-fact for the widow and invariably publishers have renewed such copyrights, in accordance with such agreements and in accordance with their interpretation of the law; in the name of the widow to the exclusion of children notwithstanding their existence, and have taken assignments from such widows alone and have acted under such assignments.

In practically all cases where copyrights actually had been renewed by and in the name of the widow, publishers have accepted assignments of such copyrights from the widow alone as full owner of such renewals, and in all cases these assignments have been acted upon.

In some cases where it was possible to obtain the signatures of the author, his wife and children, such signatures were secured. These signatures were obtained not because of a belief that such children, upon the death of the author, had rights equal to or concurrent with those of the widow, but only to cover the possibility that both parents might die before the arrival of the time to renew the copyrights in question.

In reaching its conclusion in the case of *Fred Fisher Music Co., Inc. v. Witmark & Sons* (*supra*), this Court stated at page 657

"We are fortified in this conclusion by reference to

the actual practices of authors and publishers with respect to assignment of renewals, as disclosed by the records of the Copyright Office."

and Further stated at page 658

"Many assignments have thus been entered into in good faith upon the assumption that they were valid and enforceable."

The decision of the Court below, therefore, causes great doubt and confusion, even though the assignments were entered into in good faith and upon the assumption that they were valid, enforceable and exclusive.

The case at bar is an actual example of such a situation. An examination of the records of the Office of the Register of Copyrights will disclose that since the death of B. G. DeSylva, the copyrights of ninety-five musical compositions included in and covered by the agreements made with Crawford Music Corporation and T. B. Harms Company (Appendices B and C) have been renewed in the name of his widow and that in accordance with said agreements the said renewals have been assigned by the widow to the particular publisher named therein.

An examination of said records will further disclose that since the death of B. G. DeSylva the copyrights of ninety-three musical compositions included in and covered by the agreement made with Music Publishers Holding Corporation (Appendix D) have been renewed in the name of his widow, and that in accordance with said agreements said renewals have been assigned by the widow to the particular publisher designated therein.

A further examination of said records will disclose that since the death of B. G. DeSylva, the copyrights of eleven musical compositions, included in and covered by the agreement made with Shapiro, Bernstein & Co., Inc. (Appendix E) have been renewed in the name of his widow,

and that in accordance with said agreement said renewals have been assigned by the widow to Shapiro, Bernstein & Co., Inc.

As appears from the agreement made by respondent (Appendix H), the respondent claims and has attempted to effect an assignment of a proprietary interest in all these renewed copyrights to another publisher, and in addition respondent also has purported to assign to such other publisher the copyrights in a great many additional musical compositions, renewals of which have not yet accrued, but which were included within the terms of the aforementioned agreements (Appendices B, C, D and E).

VI

The confusion resulting from the construction of the statute by the Court below is greatly increased by its holding that the word "children" as used in the statute includes an illegitimate child.

When the Court below construed section 24 in such a way as to treat the widow and child of a deceased author as being in the same class for the purpose of renewing copyrights, it is doubtful that there was taken into consideration the fact that as such, not only would each share in the financial benefits inuring therefore, but in addition each would have an independent right to dispose of the entire property to one of his own choosing.

We already have pointed out the manner in which this tends to break down and destroy exclusivity.

When this circumstance is considered in conjunction with the holding in favor of an illegitimate child, the pos-

sibilities become more appalling and it appears that dealings for renewal copyrights become almost impossible.

In the case at bar, the child, although illegitimate, appears to have been recognized by its father and was generally known of. However, in the vast majority of cases, the existence of an illegitimate child is still looked upon as something to be concealed, and most often illegitimate children are not publicly recognized but are kept hidden and secreted to every extent possible. Hence, a bona fide purchaser for value of a renewal copyright from the widow of a deceased author never could be absolutely certain that his rights would not be subject to diminution and his exclusivity destroyed as a result of an attack by an assignee of an illegitimate child of the author who might turn up suddenly at any time.

Hence, the decision below has a most serious impact upon the widows of authors and their intended assignees or licensees, and in addition must ultimately affect adversely the public itself. The decision also must raise a doubt as to the rights of legitimate children of an author after he and his widow have died, for there always remains a danger of an unknown illegitimate child entering upon the scene. Surely there are many works the public never will see or hear or have an opportunity to read because of the hesitation with which publication and production deals will be made with authors' widows or their legitimate children. ☉

The decision below has the effect of placing a potential cloud upon each and every copyright which is not renewed by the author himself during his lifetime.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals, Ninth Circuit, should be reversed.

Respectfully submitted,

SIDNEY W.M. WATTENBERG
1270 Avenue of the Americas
New York 20, N. Y.
*Attorney for Music Publishers' Protective
Association, Inc., Amicus Curiae*

PHILIP B. WATTENBERG
JOHANAN VIGODA
Both of New York City
Of Counsel

APPENDIX A

TITLE 17—UNITED STATES CODE

§ 24. DURATION; RENEWAL AND EXTENSION.—The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any (other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children, be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

APPENDIX B

AGREEMENT made this 26th day of September, 1946, by and between B. G. DESYLVA (also known as "BUD DESYLVA and GEORGE GARD DESYLVA"), hereinafter designated "Author", and CRAWFORD MUSIC CORPORATION, a New York corporation, hereinafter designated the "Corporation".

In consideration of the sum of One Dollar and other good and valuable consideration by each of the parties hereto to the other in hand paid at or before the ensembling and delivery of these presents, receipt of which is hereby acknowledged, it is agreed:

I. The Author, subject to the terms, conditions and reservations hereinafter set forth, hereby sells, assigns, transfers and sets over unto the Corporation and its successors and assigns, the renewal copyrights of the musical compositions set forth in Schedule A, hereto annexed, and all his right, title and interest, vested and contingent, therein and thereto, subject to the payment of the royalties hereinafter provided for, and the Author does hereby authorize and empower the Corporation to renew pursuant to law, for and in his name, if living, the copyrights of the musical compositions set forth in Schedule A, and the Author hereby constitutes and appoints the Corporation and its successors or assigns, and their agents, officers, servants and employees, or any of them, or the appointee or designee of them or any of them, his agent and attorney in fact to renew pursuant to law for and in his name, if living, the copyrights of the said musical compositions and each of them mentioned in Schedule A, and to execute and deliver in his name and on his behalf a formal instrument or instruments assigning to the Corporation and its successors, assigns or designees, the renewal copyrights of the said musical compositions and each of them, subject to the terms and conditions hereinafter contained. If

the Copyright Law of the United States, now in force shall be changed or amended so as to provide for an extended or longer term of copyright, then the Author hereby sells, assigns, transfers and sets over unto the Corporation and its successors, assigns or designees, all his right, title and interest in and to the musical compositions covered by this agreement for such extended or longer term of copyright.

II. The Corporation agrees to pay or cause to be paid, commencing with the beginning of the first quarter after the execution and delivery hereof, the following royalties upon all compositions covered hereby, published and sold by and paid for to the Publisher in the United States of America and Canada.

(a) Popular numbers:

Regular pianoforte copies—Three cents (3¢) per copy.

(b) Numbers written for and used in motion picture productions, regular pianoforte copies—Four cents (4¢) per copy.

(c) Numbers written for and used in living stage productions, regular pianoforte copies—Six cents (6¢) per copy.

(d) Orchestrations—Three cents (3¢) per copy.

(e) All other editions than those herein specifically provided for—Ten percent (10%) of the wholesale price.

(f) Twelve dollars and Fifty cents (\$12.50) as and when any of the said compositions is published in any folio or composite work, regardless of the number of copies published.

(g) Folios and/or composite works, as referred to in the next preceding subdivision hereof, shall be

deemed to include any publication of a collection of at least five (5) or more works, musical compositions or separate lyrics, contained within the same volume and/or binding.

- (h) No royalties shall be payable for professional material not sold or resold.
- (i) An amount equal to Fifty percent (50%) of all receipts of the Corporation in respect to any licenses issued authorizing the manufacture of parts of instruments serving to reproduce the said compositions, to use the said compositions in synchronization with sound motion pictures, or to reproduce them upon so-called "electrical transcriptions" for broadcasting purposes in the United States and Canada, and any and all receipts of the Corporation from any similar source or right now known or which may hereafter come into existence in the United States and Canada.
- (j) The Author shall not be entitled to any share of the moneys distributed to the Corporation by the American Society of Composers, Authors and Publishers, or by or through any other performing rights society or agency throughout the world, if writers receive through the same source an amount which, in the aggregate, is at least equal to the aggregate amount distributed to the Corporation. If, however, the small performance rights shall be administered directly by the Corporation, then the Corporation shall pay an amount equal to fifty percent (50%) of all net sums received by the Corporation therefrom.

The Corporation also agrees to pay or cause to be paid commencing with the beginning of the first quarter after the execution and delivery hereof, for and during the term of the respective copyrights thereof in all countries

outside of the United States and Canada, Fifty percent (50%) of all receipts from sales and uses (subject to the deduction of foreign income taxes, if any).

Where, however, numbers are printed in Canada by a distributor, licensee or representative of the Corporation, all copies of such numbers so printed and sold in Canada may, at the option of the Corporation, be treated by the Corporation as foreign sales and the rates of royalty and provision applicable to countries outside of the United States and Canada may apply.

The said royalties shall be paid upon each and all of the entire compositions (lyrics and music), and if the Author shall not be the Author of the entire composition (lyrics and music), then such royalties shall be divided one-half to the authors and one-half to the composers of each separate number, unless otherwise agreed upon by the writers.

Payment of all royalties accruing to the Author shall be made to the Author, while living, then to such person or persons as shall be lawfully entitled thereto.

III. The Author agrees that his wife, Marie DeSylva, shall execute a separate instrument in the form hereto annexed, marked B, and made part hereof.

IV. This agreement shall be binding upon and shall inure to the benefit of the Author and his heirs, executors, administrators and assigns, the Corporation and its successors and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, the day and year first above written.

B. G. DeSYLVA (L. S.)

B. G. DeSylva

CRAWFORD MUSIC CORPORATION
By MAX DREYFUS

State of California,
County of Los Angeles—ss.:

On this 26 day of September 1946, before me personally came B. G. DESYEVA, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

BEATRICE KAYE

Notary Public

In and for the State of California,
County of Los Angeles

My Commission Expires June 26, 1950

(Seal)

SCHEDULE A

Ask Me Another
Atlas Is Itless
Blue Grass
Broken-Hearted
But She's My Girl Now
College Humor
Don't Tell Her What's Happened To Me
Flaming Youth
Forgetting You
For Old Times' Sake
I Always Go To Sleep With The Blues
I Found My Way To You
I Hope I Don't Meet Molly
I'll Fool That Sweet Senorita
In The Meantime
It All Depends On You
It Goes On Like That

It's A Wonderful Wonderful World
 I Want To Be Miles Away From Ev'ryone
 I Wonder How I Look When I'm Asleep
 Just A Sweet Old Gent And A Quaint Old Lady
 Keeper Keeper Take The Boy Away
 Magnolia
 Mammy Is Gone
 My Long Lost Man
 My Sin
 Oh Baby Don't We Get Along
 Oh Murphy
 Old Fashioned Mother
 One More Time
 One O'Clock Baby
 Plenty of Sunshine
 Put It In The Bank
 Seven Veils
 She's A Home Girl
 So Blue
 Sorry For Me
 South Wind
 Tait Song
 The Church Bells Are Ringing For Mary
 The Song I Love
 The Two Two Choo Choo
 This Song Is Not About Lindbergh
 Together
 We've Got Nothin' To Use
 When The Autumn Leaves Of Life Begin To Fall
 You Could Have Been The One Baby
 You Leave Me Limp
 You Try Somebody Else
 You Won't See Me
 Without You Sweetheart
 Wop Song
 You'll Do

GOOD NEWS

A Girl Of Pi Beta Phi
 Baby-What?
 Good News
 Happy Days
 He's A Ladies Man
 Just Imagine
 Lucky In Love
 The Best Things In Life Are Free
 The Varsity Drag

FOLLOW THRU

A Man's Man
 Button Up Your Overcoat
 Follow Thru
 I Could Give Up Anything But You
 It's A Great Sport
 I Want To Be Bad
 My Lucky Star
 Then I'll Have Time For You
 No More You
 Still I'd Love You
 You Wouldn't Fool Me

HOLD EVERYTHING

Don't Hold Everything
 Footwork
 Genealogy
 Heel Beat
 Here's One Who Wouldn't
 Oh Gosh
 Outdoor Man
 'Sall Over But The Shouting
 To Know You Is To Love You
 Too Good To Be True
 We're Waiting For The Weather

HOLD EVERYTHING (continued)

When I Love I Love
You're The Cream In My Coffee

SCANDALS OF 1928

An Old Fashioned Girl
Alone With Only Dreams
American Tune
Bums
Fathers Of The World
I'm On The Crest Of A Wave
Pickin' Cotton
Second Childhood
Tap Dance
What D'Ya Say
Where Your Name Is Carved With Mine

THREE CHEERS

Because You're Beautiful
It's An Old Spanish Custom
Lady Luck Smile On Me
Maybe This Is Love
Pompanola
Two Boys

SUNNYSIDE UP

Aren't We All
Carnival Prelude
It's Great To Be Necked
Sunnyside Up
Turn On The Heat
You Find The Time
You've Got Me Pickin' Petals
If I Had A Talking Picture Of You

SAY IT WITH SONGS

I'm In Seventh Heaven
 Little Pal
 Used To You
 Why Can't You

THE SINGING FOOL

Sonny Boy

JUST IMAGINE

I Am Only The Words
 Monkey Dance
 Never Swat A Fly
 Romance Of Elmer Stremingway
 There's Something About An Old Fashioned Girl

FLYING HIGH

Airminded
 Good For You
 Happy Landing
 I'll Get My Man
 I'll Know Him
 I'm Flying High
 It'll Be The First Time For Me
 Red Hot Chicago
 Rusty's Up In The Air
 Thank Your Father
 Wasn't It Beautiful
 Without Love

INDISCREET

Come To Me
 If You Haven't Got Love

LOVE AFFAIR

Wishing (Will Make It So)

IN OLD ARIZONA

My Tonia

All other compositions written in whole or in part by B. G. DeSylva and published by DeSylva, Brown & Henderson, Inc. or Crawford Music Corporation whether or not enumerated above are included.

EXHIBIT B

The undersigned, MARIE DESYLVA, wife of B. G. DeSylva, hereby acknowledges that she has read the agreement dated September 26th, 1946, made by B. G. DESYLVA with CRAWFORD MUSIC CORPORATION, and in consideration of the sum of One Dollar and other good and valuable consideration, to the undersigned in hand duly paid, at or before the ensembling and delivery of these presents, receipt of which is hereby duly acknowledged, the undersigned hereby agrees to be bound by the same, and in the event that she should become entitled to secure renewal of the copyright in any of the musical numbers embraced by said agreement, she agrees that all such renewals of copyright shall come under said agreement, and said agreement shall be extended to and deemed to include said renewals of copyright. She agrees to execute, acknowledge and deliver, from time to time, such assignments or other instruments that may be necessary, expedient, and proper to carry out and effectuate the foregoing, and the undersigned does hereby irrevocably appoint CRAWFORD MUSIC CORPORATION and its successors and assigns, or any of its agents, servants, officers and employees, or any of them, or the appointee or designee of any of them, her true and lawful attorney for her and in her place and stead to procure and obtain renewals of copyrights of the musical compositions referred to and covered by the said agreement, and to execute and deliver in her name formal as-

signments to the Corporation, its successors and assigns, of such renewals of copyright and each of them, subject to the provisions of the said agreement.

Dated:

MARIE DESYLVA (L. S.)

IN THE PRESENCE OF:

A. L. BERMAN

State of California,
County of Los Angeles—ss:

On this 26th day of September 1946, before me personally came MARIE DESYLVA, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

BEATRICE KAYE

Notary Public,

In and for the State of California,
County of Los Angeles.

My Commission Expires June 26, 1950

(Seal)

COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA
THE LIBRARY OF CONGRESS—Washington

This is to certify that the attached instrument was recorded in the assignment records of the Copyright Office, vol. 614, pages 53-63 on November 15, 1946.

In testimony whereof, the seal of this Office is affixed hereto.

SAM B. WARNER
Register of Copyrights

(Seal)

Librarian of Congress
Copyright Office
United States of America

APPENDIX C

AGREEMENT made this 26th day of September, 1946, by and between B. G. DESYLVA (also known as "BUD DESYLVA and GEORGE GARD. DESYLVA"), hereinafter designated "Author", and T. B. HARMS COMPANY, a New York corporation, hereinafter designated the "Corporation".

In consideration of the sum of One Dollar and other good and valuable consideration by each of the parties hereto to the other in hand paid at or before the ensembling and delivery of these presents, receipt of which is hereby acknowledged, it is agreed:

I. The Author, subject to the terms, conditions and reservations hereinafter set forth, hereby sells, assigns, transfers and sets over unto the Corporation and its successors and assigns, the renewal copyrights of the musical compositions set forth in Schedule A, hereto annexed, and all his right, title and interest, vested and contingent, therein and thereto, subject to the payment of the royalties hereinafter provided for, and the Author does hereby authorize and empower the Corporation to renew pursuant to law, for and in his name, if living, the copyrights of the musical compositions set forth in Schedule A, and the Author hereby constitutes and appoints the Corporation and its successors or assigns, and their agents, officers, servants and employees, or any of them, or the appointee or designee of them or any of them, his agent and attorney in fact to renew pursuant to law for and in his name, if living, the copyrights of the said musical compositions and each of them mentioned in Schedule A, and to execute and deliver in his name and on his behalf a formal instrument or instruments assigning to the Corporation and its successors, assigns or designees, the renewal copyrights of the said musical compositions and each of them, subject to the terms and conditions hereinafter contained. If the Copyright Law

of the United States, now in force shall be changed or amended so as to provide for an extended ~~or~~ longer term of copyright, then the Author hereby sells, assigns, transfers and sets over unto the Corporation and its successors, assigns or designees, all his right, title and interest in and to the musical compositions covered by this agreement for such extended or longer term of copyright.

II. The Corporation agrees to pay or cause to be paid, commencing with the beginning of the first quarter after the execution and delivery hereof, the following royalties upon all compositions covered hereby, published and sold by and paid for to the Publisher in the United States of America and Canada.

(a) Popular numbers:

Regular pianoforte copies—Three cents (3¢) per copy.

(b) Numbers written for and used in motion picture productions, regular pianoforte copies—Four cents (4¢) per copy.

(c) Numbers written for and used in living stage productions, regular pianoforte copies—Six cents (6¢) per copy.

(d) Orchestrations—Three cents (3¢) per copy.

(e) All other editions than those herein specifically provided for—Ten percent (10%) of the wholesale price.

(f) Twelve Dollars and Fifty Cents (\$12.50) as and when any of the said compositions is published in any folio or composite work, regardless of the number of copies published.

(g) Folios and/or composite works, as referred to in the next preceding subdivision hereof, shall be deemed to include any publication of a collection of at least five (5) or more works, musical composi-

tions or separate lyrics, contained within the same volume and/or binding.

(h) No royalties shall be payable for professional material not sold or resold.

(i) An amount equal to Fifty percent (50%) of all receipts of the Corporation, in respect to any licenses issued authorizing the manufacture of parts of instruments serving to reproduce the said compositions, to use the said compositions in synchronization with sound motion pictures, or to reproduce them upon so-called "electrical transcriptions" for broadcasting purposes in the United States and Canada, and any and all receipts of the Corporation from any similar source or right now known or which may hereafter come into existence in the United States and Canada.

(j) The Author shall not be entitled to any share of the moneys distributed to the Corporation by the American Society of Composers, Authors and Publishers, or by or through any other performing rights society or agency throughout the world, if writers receive through the same source an amount which, in the aggregate, is at least equal to the aggregate amount distributed to the Corporation. If, however, the small performance rights shall be administered directly by the Corporation, then the Corporation shall pay an amount equal to fifty percent (50%) of all net sums received by the Corporation therefrom.

The Corporation also agrees to pay or cause to be paid commencing with the beginning of the first quarter after the execution and delivery hereof, for and during the term of the respective copyrights thereof in all countries outside of the United States and Canada, Fifty percent (50%) of all receipts from sales and uses (subject to the deduction of foreign income taxes, if any).

Where, however, numbers are printed in Canada by a distributor, licensee or representative of the Corporation, all copies of such numbers so printed and sold in Canada may, at the option of the Corporation, be treated by the Corporation as foreign sales and the rates of royalty and provision applicable to countries outside of the United States and Canada may apply.

The said royalties shall be paid upon each and all of the entire compositions (lyrics and music), and if the Author shall not be the Author of the entire composition (lyrics and music), then such royalties shall be divided one-half to the authors and one-half to the composers of each separate number, unless otherwise agreed upon by the writers.

Payment of all royalties accruing to the Author shall be made to the Author, while living, then to such person or persons as shall be lawfully entitled thereto.

III. The Author agrees that his wife, Marie DeSylva, shall execute a separate instrument in the form hereto annexed, marked B, and made part hereof.

IV. This agreement shall be binding upon and shall inure to the benefit of the Author and his heirs, executors, administrators and assigns, and the Corporation and its successors and assigns.

IN WITNESS WHEREOF  es hereto have hereunto set their hands and seals this _____ day and year first above written.

B. G. DESYLVA (L. S.)
B. G. DeSylva

T. B. HARMS COMPANY
By MAX DREYFUS

State of California,
County of Los Angeles—ss.?

On this 26th day of September 1946, before me personally came B. G. DeSYLVA, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

BEATRICE KAYE
Notary Public,

In and for the State of California,
County of Los Angeles

My Commission Expires June 26, 1950

(Seal)

SCHEDULE A

	Composer	Author	
A Business Of Our Own	Jerome Kern	Bud DeSylva	1919
Forget Me Not	Jerome Kern	Bud DeSylva	1919
Give A Little Thought To Me	Jerome Kern	Bud DeSylva	1919
The Language Of Love	Jerome Kern	Bud DeSylva	1919
A Little Backyard Band	Jerome Kern	Bud DeSylva	1919
Look For The Silver Lining	Jerome Kern	Bud DeSylva	1920
A Man Around The House	Jerome Kern	Bud DeSylva	1919
Telephone Girls	Jerome Kern	Bud DeSylva	1919
Whip Poor Will	Jerome Kern	Bud DeSylva	1920
You Must Come Over	Jerome Kern	Bud DeSylva	1921
You Tell 'Em	Jerome Kern	Bud DeSylva	1919
The Sweetest Thing In Life	Jerome Kern	Bud DeSylva	1924

All other compositions written in whole or in part by B. G. DeSylva and published by T. B. Harms Company whether or not enumerated above are included.

EXHIBIT B

The undersigned, MARIE DESYLVA, wife of B. G. DeSylva, hereby acknowledges that she has read the agreement dated September 26th, 1946, made by B. G. DeSylva, with T. B. Harms Company, and in consideration of the sum of One Dollar and other good and valuable consideration, to the undersigned in hand duly paid, at or before the en sealing and delivery of these presents, receipt of which is hereby duly acknowledged, the undersigned hereby agrees to be bound by the same, and in the event that she should become entitled to secure renewal of the copyright in any of the musical numbers embraced by said agreement, she agrees that all such renewals of copyright shall come under said agreement, and said agreement shall be extended to and deemed to include said renewals of copyright. She agrees to execute, acknowledge and deliver, from time to time, such assignments or other instruments that may be necessary, expedient, and proper to carry out and effectuate the foregoing, and the undersigned does hereby irrevocably appoint T. B. HARMS COMPANY and its successors and assigns, or any of its agents, servants, officers and employees, or any of them, or the appointee or designee of any of them, her true and lawful attorney for her and in her place and stead to procure and obtain renewals of copyrights of the musical compositions referred to and covered by the said agreement, and to execute and deliver in her name formal assignments to the Corporation, its successors and assigns, of such renewals of copyright and each of them, subject to the provisions of the said agreement.

Dated:

MARIE DESYLVA (L. S.)
Marie DeSylva

IN THE PRESENCE OF:

A. L. BEKMAN

State of California,
County of Los Angeles—ss.:

On this 26th day of September 1946, before me personally came MARIE DESYLVA, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

BEATRICE KAYE

Notary Public,

In and for the State of California,
County of Los Angeles

My Commission Expires June 26, 1950

(Seal)

A

COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA
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This is to certify that the attached instrument was recorded in the assignment records of the Copyright Office, vol. 614, pages 64-71 on November 15, 1946.

In testimony whereof, the seal of this Office is affixed hereto.

SAM B. WARNER

Register of Copyrights

(Seal)

Librarian of Congress
Copyright Office
United States of America

APPENDIX D

The undersigned, MARIE DESYLVA, wife of B. G. DESYLVA, hereby acknowledges that she has read the agreement dated September 26th, 1946, made by B. G. DESYLVA with MUSIC PUBLISHERS HOLDING CORPORATION, and in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration, to the undersigned in hand duly paid, at or before the ensealing and delivery of these presents, receipt of which is hereby duly acknowledged, the undersigned hereby agrees to be bound by the same, and in the event she should become entitled to secure renewal of the copyright in any of the musical numbers embraced by said agreement, she agrees that all such renewals of copyright shall come under said agreement, and said agreement shall be extended to and deemed to include said renewals of copyright. She agrees to execute, acknowledge and deliver, from time to time, such assignments or other instruments that may be necessary, expedient, and proper to carry out and effectuate the foregoing, and the undersigned does hereby irrevocably appoint MUSIC PUBLISHERS HOLDING CORPORATION and its successors or assigns, or any of its agents, servants, officers and employees or any of them, or the appointee or designee of any of them, her true and lawful attorney for her and in her place and stead to procure and obtain renewals of copyrights of the musical compositions referred to and covered by the said agreement, and to execute and deliver in her name, formal assignments to the Corporation, its successors and assigns, of such renewals of copyright and each of them, subject to the provisions of the said agreement.

DATED:

MARIE DESYLVA (L. S.)
Marie DeSylva

IN PRESENCE OF:

A. L. BERMAN

State of California,
County of Los Angeles—ss.:

On this 26th day of September 1946, before me personally came MARIE DESYLVA, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

BEATRICE KAYE

Notary Public,

In and for the State of California

County of Los Angeles

My Commission Expires June 26, 1950

(Seal)

A

COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA

THE LIBRARY OF CONGRESS—Washington

This is to certify that the attached instrument was recorded in the assignment records of the Copyright Office, vol. 617, pages 202-203 on January 7, 1947.

In testimony whereof, the seal of this Office is affixed hereto.

SAM B. WARNER

Register of Copyrights

(Seal)

Librarian of Congress

Copyright Office

United States of America

AGREEMENT made this 26th day of September, 1946, by and between B. G. DESYLVA, (also known as "BUD DESYLVA and GEORGE GARD DESYLVA"), hereinafter designated "Author", and MUSIC PUBLISHERS HOLDING CORPORATION, a Delaware corporation, hereinafter designated the "Corporation",

WITNESSETH:

WHEREAS the Author has composed and written, in whole or in part, the music and/or lyrics of various musical compositions first published and copyrighted during the year 1918 and/or any years subsequent thereto down to the date hereof, the title of which, among others, are mentioned in Schedule "A" hereto annexed. All numbers written and composed in whole or in part by the Author and published by M. Witmark & Sons, Remick Music Corporation or Harms, Inc., during said period are intended to be covered hereby, whether or not listed on said schedule, and

WHEREAS the Author represents and warrants that he has not heretofore sold, assigned, transferred or otherwise disposed of, or pledged, hypothecated or otherwise encumbered the renewal copyrights of the musical compositions listed in Schedule A, or any other numbers not listed therein but covered hereby, or any interest therein or thereto or any of them, other than such agreements as the Author may have heretofore entered into with the Corporation, or its subsidiaries, and with the American Society of Composers, Authors and Publishers, and

WHEREAS the Corporation desires to contract with the Author for his interest in the renewal rights of the compositions mentioned in Schedule A,

NOW THEREFORE, in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration by each of the parties hereto to the other in hand paid at or before the en sealing and delivery of these presents, receipt of which is hereby acknowledged, it is agreed:

I. The Author, subject to the terms, conditions and reservations hereinafter set forth, hereby sells, assigns, transfers and sets over unto the Corporation and its successors and assigns, the renewal copyrights of the musical compositions set forth in Schedule A, hereto annexed, and all his right, title and interest, vested and contingent, therein and thereto, subject to the payment of the royalties hereinafter provided for, and the Author does hereby authorize and empower the Corporation to renew pursuant to law, for and in his name, if living, the copyrights of the musical compositions set forth in Schedule A, and the Author hereby constitutes and appoints the Corporation and its successors or assigns, and their agents, officers, servants and employees, or any of them, or the appointee or designee of them or any of them, his agent and attorney in fact to renew pursuant to law for and in his name, if living, the copyrights of the said musical compositions and each of them mentioned in Schedule A, and to execute and deliver in his name and on his behalf a formal instrument or instruments assigning to the Corporation and its successors, assigns or designees, the renewal copyrights of the said musical compositions and each of them, subject to the terms and conditions hereinafter contained. If the Copyright Law of the United States, now in force shall be changed or amended so as to provide for an extended or longer term of copyright, then the Author hereby sells, assigns, transfers and sets over unto the Corporation and its successors, assigns or designees, all his right, title and interest in and to the musical compositions covered by this agreement for such extended or longer term of copyright.

II. The Corporation agrees to pay or cause to be paid, commencing with the beginning of the first quarter after the execution and delivery hereof, the following royalties upon all compositions covered hereby, published and sold by and paid for to the Publisher in the United States of America and Canada.

(a) Popular numbers:

Regular pianoforte copies—Three Cents (3¢) per copy.

(b) Numbers written for and used in motion picture productions, regular pianoforte copies—Four Cents (4¢) per copy.

(c) Numbers written for and used in living stage productions, regular pianoforte copies—Six Cents (6¢) per copy.

(d) Orchestrations—Three Cents (3¢) per copy.

(e) All other editions than those herein specifically provided for—Ten percent (10%) of the wholesale price.

(f) Twelve Dollars and Fifty Cents (\$12.50) as and when any of the said compositions is published in any folio or composite work, regardless of the number of copies published.

(g) Folios and/or composite works, as referred to in the next preceding subdivision hereof, shall be deemed to include any publication of a collection of at least five (5) or more works, musical compositions or separate lyrics, contained within the same volume and/or binding.

(h) No royalties shall be payable for professional material not sold or resold.

(i) An amount equal to Fifty percent (50%) of all receipts of the Corporation, in respect to any licenses issued authorizing the manufacture of parts

of instruments serving to reproduce the said compositions, to use the said compositions in synchronization with sound motion pictures, or to reproduce them upon so-called "electrical transcriptions" for broadcasting purposes in the United States and Canada, and any and all receipts of the Corporation from any similar source of right now known or which may hereafter come into existence in the United States and Canada.

- (j) The Author shall not be entitled to any share of the moneys distributed to the Corporation by the American Society of Composers, Authors and Publishers, or by or through any other performing rights society or agency throughout the world, if writers receive through the same source an amount which, in the aggregate, is at least equal to the aggregate amount distributed to the Corporation. If, however, the small performance rights shall be administered directly by the Corporation, then the Corporation shall pay an amount equal to fifty percent (50%) of all net sums received by the Corporation therefrom.

The Corporation also agrees to pay or cause to be paid commencing with the beginning of the first quarter after the execution and delivery hereof, for and during the term of the respective copyrights thereof in all countries outside of the United States and Canada, Fifty percent (50%) of all receipts from sales and uses (subject to the deduction of foreign income taxes, if any).

Where, however, numbers are printed in Canada by a distributor, licensee or representative of the Corporation, all copies of such numbers so printed and sold in Canada may, at the option of the Corporation, be treated by the Corporation as foreign sales and the rates of royalty and provision applicable to countries outside of the United States and Canada may apply.

The said royalties shall be paid upon each and all of

the entire compositions (lyrics and music), and if the Author shall not be the Author of the entire composition (lyrics and music), then such royalties shall be divided one-half to the authors and one-half to the composers of each separate number, unless otherwise agreed upon by the writers.

Payment of all royalties accruing to the Author shall be made to the Author, while living, then to such person or persons as shall be lawfully entitled thereto.

III. The Author hereby confirms the fact that prior to the date of this agreement, M. Witmark & Sons, Remick Music Corporation and Harms, Inc., were and now are possessed of, and entitled to the original copyright of songs mentioned in said Schedule A, (except the numbers of HUMPTY DUMPTY—TAKE A CHANCE), and of each and every right thereunder, except living stage performing rights of numbers written for dramatico-musical works, and except such rights as may be vested in the American Society of Composers, Authors and Publishers, and that the Author duly assigned to M. Witmark & Sons, Remick Music Corporation or Harms, Inc., or to their respective predecessors in interest, prior to its securing the copyright thereof, said songs mentioned in Schedule A, (except the numbers of HUMPTY DUMPTY—TAKE A CHANCE) and any other numbers not listed therein but covered hereby, and all his right, title and interest therein and thereto, except living stage performing rights of numbers written for dramatico-musical works, and except such rights as may be vested in the American Society of Composers, Authors and Publishers.

IV. The Author agrees that his wife, Marie DeSylva, shall execute a separate instrument in the form hereto annexed, marked B, and made part hereof.

V. This agreement shall be binding upon and shall inure to the benefit of the Author and his heirs, executors,

administrators and assigns, and the Corporation and its successors and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, the day and year first above written.

B. G. DeSYLVA (L.S.)

B. G. DeSylva

MUSIC PUBLISHERS HOLDING CORPORATION

By: HERMAN STARR

State of California,

County of Los Angeles—ss:

On this 26 day of September 1946, before me personally came B. G. DeSYLVA, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

BEATRICE KAYE

Notary Public,

In and for the State of California,

County of Los Angeles

My Commission Expires June 26, 1950

(Seal)

SCHEDULE A

B. G. DESYLVA COMPOSITIONS

Published by:—M. WITMARK & SONS
 REMICK MUSIC CORPORATION
 HARMS, INC.

YEAR	TITLE	CO.	CO-WRITER(S)
1918	Angel Child	(R)	Louis Silvers
	Ev'ry Morning She Makes Me Late	(R)	Kahn & Jolson
	Give A Little Credit To The Navy	(R)	Gumble & Kahn
	She Was Not So Bad For A Country Girl	(R)	
	Tackin' 'Em Down	(R)	Albert Gumble
	I'll Say She Does	(R)	Kahn & Jolson
	'N Everything	(R)	Kahn & Jolson
	from <i>Sinbad</i>		
	But After The Ball Was Over	(R)	Arthur J. Jackson
	If She Means What I Think She Means	(R)	Arthur J. Jackson
	from <i>Ziegfeld Follies 1918</i>		
1919	All That I Need To Know Is That		
	You Come From Dixie	(R)	Gumble & Jackson
	Moonlight On The Nile	(R)	Lenzberg & Kahn
	Oh, Agnes	(R)	Arthur J. Jackson
	Oh You Delicious Little Devil	(R)	Alfred Bryan
	That Lullaby Of Long Ago	(R)	Whiting, Kahn & Egan
	You Ain't Heard Nothing Yet	(R)	Jolson & Kahn
	Best Of Everything, The	(H)	G. Gershwin & A. Jackson
	From Now On	(H)	G. Gershwin & A. Jackson
	Love Of A Wife, The	(H)	G. Gershwin & A. Jackson
	Nobody But You	(H)	G. Gershwin & A. Jackson
	Somehow It Seldom Seems True	(H)	G. Gershwin & A. Jackson
	Tee-Oodle-Um-Bum-Bo	(H)	G. Gershwin & A. Jackson
	from <i>La, La Lucille</i>		
	By The Honeysuckle Vine	(H)	Al Jolson
	Chloe	(H)	Al Jolson
	I Gave Her That	(H)	Al Jolson
	They Can't Fool Me	(H)	Al Jolson
	from <i>Sinbad</i>		
	I'm The Boy And I'm The Girl		
	from <i>Good Morning, Judge</i>	(R)	Louis Silvers

YEAR	TITLE	CO.	CO-WRITER(S)
1920	Avalon	(R)	Jolson & V. Rose
	In An Oriental Garden	(R)	Goldstein & Kahn
	Lunchhouse Nights	(H)	G. Gershwin & Mears
	Love Flower	(H)	Silvers & Caesar
	Poppyland	(H)	G. Gershwin & Mears
	Settling Down	(H)	
	Sunny May Afternoon	(H)	
	While The City Sleeps	(H)	
	You're All That I Need	(H)	
	from <i>I'll Say She Does</i>		
	Just Snap Your Fingers At Care	(H)	
	from <i>Greenwich Village Follies</i>		
1921	Dixie Rose	(H)	G. Gershwin & Caesar
	I Call You Sunshine	(H)	Silvers & Caesar
	Some Day You'll Find Your		
	Dream Street	(R)	Louis Silvers
	Sunshine	(H)	Silvers & Caesar
	Swanee Rose	(H)	G. Gershwin & Caesar
	Tomale (I'm Hot For You)	(H)	G. Gershwin
	Yoo Hoo	(R)	Al Jolson
	Rosemary	(H)	Dave Stamper
	What A World This Would Be		
	from <i>Ziegfeld Follies of 1921</i>	(H)	Dave Stamper
	April Showers	(H)	Louis Silvers
	Don't Send Your Wife To The		
	Country	(H)	Atteridge & Conrad
	Down South	(H)	Walter Donaldson
	Give Me My Mammy	(H)	Walter Donaldson
	Tallahassee	(H)	Luckieth Roberts
	from <i>Bombo</i>		
	My Log Cabin Home	(H)	G. Gershwin & Caesar
	from <i>The Perfect Fool</i>		
1922	Don't Leave Me Mammy	(R)	Conrad, Santly, B. Da
	Dream On	(H)	Victor Herbert
	Flapper, The	(H)	George Gershwin
	It's Up To You	(H)	Maurice Yvain
	Silver Canoe, A	(H)	Vincent Rose
	Yankee Doodle Blues, The	(H)	G. Gershwin & Caesar
	Al Jolson's Coo Coo Song	(H)	Al Jolson
	from <i>Bombo</i>		
	Across The Sea	(H)	G. Gershwin & Goetz
	Argentina	(H)	G. Gershwin

YEAR TITLE

CO. CO-WRITER(S)

Cinderelatives	(H) George Gershwin
I Found A Four Leaf Clover	(H) George Gershwin
I'll Build A Stairway To Paradise	(H) G. Gershwin & A. Francis
She Hangs Out In Our Alley	(H) G. Gershwin & Goetz
Where Is The Man Of My Dreams from <i>George White's Scandals</i>	(H) George Gershwin
Do It Again from <i>The French Doll</i>	(H) George Gershwin
Dream Of Orange Blossoms	• (H) Victor Herbert
In Hennequeville	• (H) Victor Herbert
Kiss In The Dark, A	• (H) Victor Herbert
Legend Of The Glow Worm	• (H) Victor Herbert
Lonely Nest, The	• (H) Victor Herbert
Then Comes The Dawning	• (H) Victor Herbert
This Time It's Love	• (H) Victor Herbert
Way Out West In Jersey from <i>Orange Blossoms</i>	• (H) Victor Herbert Assigned to M. Witmark & Sons
Forbidden Fruit	(H) Emmerich Kalman
In The Starlight	(H) Emmerich Kalman
I Still Can Dream	(H) Emmerich Kalman
My Bajadere	(H) Emmerich Kalman
Roses, Lovely Roses	(H) Emmerich Kalman
Waltz Is Made For Love, The from <i>The Yankee Princess</i>	(H) Emmerich Kalman
1923 Bundle Of Love, A	(H) Al Jolson
Don't Cry Swanee	(H) Al Jolson & Conrad
Morning Will Come from <i>Bombo</i>	(H) Jolson & Conrad
I Won't Say I Will But I Won't Say I Won't from <i>Little Miss Bluebeard</i>	(H) G. Gershwin & A. Francis
At Half Past Seven	(H) George Gershwin
Fabric Of Dreams from <i>The Nifties</i>	(H) Hubbell & A. Francis
Jijibo, The	(H) George Gershwin
Mah Jongg	(H) George Gershwin
Pepita	(H) George Gershwin
Someone Believes In You	(H) George Gershwin
Under A One Man Top	(H) George Gershwin
Virginia, Don't Go Too Far from <i>A Perfect Lady</i>	(H) George Gershwin

YEAR	TITLE	CO.	CO-WRITER(S)
923	Let's Be Lonesome Together	(H)	G. Gershwin & Goetz
	Life Of A Rose, The	(H)	George Gershwin
	Lo-La-Lo	(H)	George Gershwin
	On The Beach At How've-You-Been	(H)	George Gershwin
	There Is Nothing Too Good For You	(H)	G. Gershwin & Goetz
	Throw Her In High	(H)	G. Gershwin & Goetz
	Where Is She?	(H)	George Gershwin
	You And I (In Old Versailles) from <i>George White's Scandals</i>	(H)	G. Gershwin & J. Green
924	California, Here I Come	(W)	Jolson & J. Meyer
	Memory Lane	(H)	L. Spier & Conrad
	Must It Be Goodbye	(H)	Joseph Meyer
	Step Henrietta	(R)	Joseph Meyer
	Was It A Dream	(H)	Larry Spier
	As Long As I've Got My Mammy	(H)	J. Meyer & Hanley
	Born And Bred In Old Kentucky	(H)	J. Meyer & Hanley
	Hello Tucky	(H)	J. Meyer & Hanley
	Keep Smiling At Trouble from <i>Big Boy</i>	(H)	Gensler & Jolson
	I Don't Want A Girlie from <i>No, No, Nanette</i>	(H)	Vincent Youmans
	Best of Everything from <i>Stop Flirting</i> (London Revue)	(H)	G. Gershwin & A. Jackson
	Hey! Hey! Let 'Er Go from <i>Sweet Little Devil</i>	(H)	George Gershwin
	I Need A Garden	(H)	George Gershwin
	Kongó Kate	(H)	George Gershwin
	Night Time In Araby	(H)	George Gershwin
	Rose Of Madrid	(H)	George Gershwin
	Somebody Love's Me	(H)	George Gershwin
	Tune In (To Station J.O.Y.)	(H)	George Gershwin
	Year After Year from <i>George White's Scandals</i>	(H)	George Gershwin
925	I'm Goin' Out If Lizzie Comes In	(R)	Henderson & Brown
	Just A Cottage Small (By A Waterfall)	(H)	James F. Hanley
	Mother Me, Tennessee	(R)	Phil Charig
	Night Of Love, A	(H)	Larry Spier
	Outdoor Life	(W)	Jolson & J. Meyer
	Twilight (Dreaming Of You)	(H)	H. Alpert & N. E. Riter
	Whoopie	(H)	Conrad & Lew Brown
	Dance From Down Yonder	(H)	J. Meyer & Hanley

YEAR TITLE

CO. CO-WRITER(S)

1925 Backawainia	(H) J. Meyer & Hanley
Miami	(H) Jolson & Conrad
Nobody But Fanny	(H) Jolson & Conrad
Who Was Chasing Paul Revere from <i>Big Boy</i>	(H) J. Meyer & Hanley
Ain't Love Wonderful	(H) Stephen Jones
Fond Of You	(H) Lewis E. Gensler
I Do	(H) Lewis E. Gensler
Kiki	(H) Lewis E. Gensler
Only One For Me	(H) Lewis E. Gensler
Sea Legs	(H) Lewis E. Gensler
You Must Come Over Blues from <i>Captain Jinks</i>	(H) Lewis E. Gensler
Sugar Plum from <i>Gay Parce</i>	(H) Joseph E. Meyer
Baby	(H) G. & Ira Gershwin
Kickin' The Clouds Away	(H) G. & Ira Gershwin
My Fair Lady	(H) G. & Ira Gershwin
Three Times A Day	(H) G. & Ira Gershwin
Tell Me More	(H) G. & Ira Gershwin
Why Do I Love You from <i>My Fair Lady</i>	(H) G. & Ira Gershwin
Beware Of A Girl With A Fan	(H) Henderson & Brown
Fly Butterfly	(H) Ray Henderson
Give Us The Charleston	(H) Ray Henderson
I Want A Lovable Baby	(H) Ray Henderson
Rose Time	(H) Henderson & Brown
What A World This Would Be	(H) Ray Henderson
Whois-Whatsis, The from <i>George White's Scandals</i>	(H) Henderson & Brown
1926 At The Foot Of The Hill Of Dreams	(H) James F. Hanley
Here I Am	(R) Henderson & L. Brown
Promise In Your Eyes	(H) James F. Hanley
When Day Is Done	(H) Robert Katzcher
Beautiful Baby	(H) James F. Hanley
Cross Your Heart	(H) Lewis E. Gensler
Don't Forget	(H) James F. Hanley
Everything Will Happen For The Best	(H) Lewis E. Gensler
Gentlemen Prefer Blondes	(H) Lewis E. Gensler
It Pays To Advertise	(H) Lewis E. Gensler
Oh What A Lovely Day	(H) Lewis E. Gensler
Weaker Sex, The	(H) Lewis E. Gensler
Who'll Mend A Broken Heart	(H) Lewis E. Gensler

YEAR TITLE

CO. CO-WRITER(S)

1926 You'll Never Know from <i>Queen High</i>	(H) Lewis, E. Gensler
Birth Of The Blues, The	(H) Brown & Henderson
Black Bottom	(H) Brown & Henderson
Girl Is You And The Boy Is Me, The	(H) Brown & Henderson
Lucky Day	(H) Brown & Henderson
Sevilla	(H) Brown & Henderson
Tweet Tweet from <i>George White's Scandals</i>	(H) Brown & Henderson
1927 Just A Memory	(H) Brown & Henderson
Broadway	(H) Brown & Henderson
Five Step, The	(H) Brown & Henderson
Home Again	(H) Brown & Henderson
I'd Like You To Love Me	(H) Brown & Henderson
It Won't Be Long Now	(H) Brown & Henderson
Just A Cozy Hide Away	(H) Brown & Henderson
Manhattan Mary	(H) Brown & Henderson
My Blue Bird's Home Again	(H) Brown & Henderson
Nothing But Love from <i>Manhattan Mary</i>	(H) Brown & Henderson
1932 Eadie Was A Lady	(H) Whiting & Nacio
Humpty Dumpty	(H) Whiting & Nacio
I'm Way Ahead Of The Game	(H) Whiting & Nacio
I Want To Be With You	(H) Vincent Youmans
My Lover	(H) Vincent Youmans
Night	(H) Whiting & Nacio
Oh How I Long To Belong To You	(H) Vincent Youmans
Rise 'N Shine	(H) Vincent Youmans
Should I Be Sweet	(H) Vincent Youmans
So Do I	(H) Vincent Youmans
Turn Out The Light	(H) Whiting & Nacio
You're An Old Smoothie from <i>Take a Chance</i>	(H) Whiting & Nacio

D-15

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COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA
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This is to certify that the attached instrument was
recorded in the assignment records of the Copyright
Office, vol. 617, pages 204-215 on January 7, 1947.

In testimony whereof, the seal of this Office is affixed
hereto.

SAM B. WARNER
Register of Copyrights

(Seal)

Librarian of Congress
Copyright Office
United States of America

E-1
APPENDIX E

ROYALTY CONTRACT—SECOND TERM OF COPYRIGHT

SHAPIRO, BERNSTEIN & CO. INC.

1270 Sixth Avenue
New York 20, N. Y.

AGREEMENT made March , 1947, between B. G. DESYLVA 444 North Faring Road, Holmby Hills, West Los Angeles, California hereinafter designated "GRANTOR", and SHAPIRO, BERNSTEIN & Co. Inc., a New York Corporation, hereinafter designated the "COMPANY".

WITNESSETH

WHEREAS, B. G. DESYLVA hereinafter designated "WRITER", originated and composed the music and/or words of a certain musical composition(s) entitled: "IF YOU KNEW SUSIE", ALABAMA BOUND", and all other songs listed on the reverse hereof which were published, and the claim(s) of the copyright of such composition(s) for the United States for the first and original term was/were registered in the Office of the Register of Copyrights by SHAPIRO, BERNSTEIN & Co. Inc., and/or SKIDMORE MUSIC Co. Inc., by such of the said publishers who or which first copyrighted the same, and,

WHEREAS, the GRANTOR desires to assign to the COMPANY the copyright to said musical composition(s) for the term of its/their renewal which will/has/have accrue(d) to and become vested in the GRANTOR by virtue of the existing copyright law of the United States.

NOW, THEREFORE, in consideration of the sum of \$2205.44 (bonus), paid on the execution hereof by the COMPANY to the GRANTOR, and for other valuable considerations, the receipt whereof is hereby acknowledged by the GRANTOR, it is agreed:—

1. The GRANTOR represents and warrants unto the Com-

PANY and its successors and assigns that the WRITER was the author and/or composer of the words and/or music, either alone or together with others, of the above musical composition(s) copyrighted as above; that the same (was) (were) published; that the GRANTOR has not in any manner transferred or encumbered in whole or in part said copyright(s) for the renewal and extended term, or the right to obtain the same, or to secure registration thereof; that no agreement or other grant exists inconsistent with the assignment and transfer hereunder, or which will or may prevent the GRANTOR from making this agreement and the assignment and transfer hereunder, or interfere with the COMPANY acquiring said copyright(s) and all of the rights herein provided.

(a) The GRANTOR represents and warrants to the COMPANY that he/she/they is/are the person(s) entitled by law to the renewal(s) herein specified.

II. The GRANTOR hereby sells, conveys and transfers unto the COMPANY, without reservation, exclusively and absolutely, all of his/her/their right, title and interest in and to said musical composition(s), and the title(s) thereto, including, but not limited to the right to change, alter and/or modify the lyrics, music and/or title(s) of such composition(s) and the full unlimited and unrestricted right to dramatize such composition(s) and make literary use thereof, or c. the material therein, in any form(s), together with the copyright thereto for the renewed and extended term, the right to secure registration thereof in the name of the GRANTOR as may be permitted under the existing copyright law, or in the name of the COMPANY, if deemed advisable by it, and all rights, whether now known or hereafter to become known, which the GRANTOR has or to which he/she/they may become entitled for and throughout the entire term for which the copyright(s) may be renewed or extended under the existing copyright law of the United States, and by present and future amendments thereto, or under any law or statute hereinafter enacted.

in substitution for the existing statute or of like import and effect; and also all copyrights, rights to secure copyrights, and all similar or dissimilar rights, whether now known or unknown, which the GRANTOR and/or the WRITER has or which he/she/they may become entitled to for all countries outside of the United States which the GRANTOR can convey, transfer or grant, and the company accepts the same:

.III. Subject to and upon the condition that the GRANTOR shall have duly and fully performed the several obligations on his/her/their part set forth herein, and provided the COMPANY shall have become the owner of the renewal(s) and extension(s) of copyright(s) for the United States, and all rights by law in and to such copyright(s), and the necessary and required transfer of all the interest of the GRANTOR shall have been evidenced by duly delivered instruments and duly recorded in the Office of the Register of Copyrights of the United States, that thereupon the COMPANY will pay to the GRANTOR, or in the event of his/her/their death, then to his/her/their estate, on account of royalties to accrue from the publication, sale and other uses by the COMPANY of the said musical composition(s) during the renewed or extended term of said copyright(s), a royalty of three (3¢) cents per each pianoforte copy of said composition(s) sold in the United States and Canada and paid for, and three (3¢) cents for each orchestra arrangement sold in the United States and Canada and paid for, and a sum equal to fifty (50%) percent of the net revenue actually realized by the COMPANY, from synchronization, electrical transcription, foreign publication, the use of said musical composition(s) by mechanical instruments, such as phonographs, music rolls, the use of the title(s), dramatization and literary uses; such royalties and further payments to be made thirty (30) days following each semi-annual period (January and July) during the renewed or extended term.

IV. It is agreed that the COMPANY shall not be obligated to pay, nor shall the GRANTOR be entitled to receive royalties on the following: Complimentary copies, copies sold but not paid for, copies sold and returned to the COMPANY, copies delivered on consignment but not sold, copies sold or given away as new issues or for advertising purposes, professional copies, copies included in folios or books or published in newspapers, magazines or other periodicals; medley or other arrangements of, or containing said works or any part thereof, arrangements for guitar, concertina or other musical instruments (except orchestra), whether the same shall be issued in sheet, folio, or book form or otherwise, all of which may be sold or otherwise disposed of by the COMPANY, its successors and assigns, free of all royalty and for its own benefit.

V. The COMPANY may, at any time, authorize or permit the use in any manner, by any person, firm or corporation, of the lyrics or words of said song(s) or musical composition(s), and the GRANTOR shall not be entitled to receive, nor will he/she/they make any claim for royalty or other payments therefor, except to the extent of fifty per cent (50%) of any amounts received by the COMPANY.

VI. Any sums paid or advanced to the GRANTOR upon the signing of this agreement or thereafter shall be repaid to the COMPANY from and out of the royalties and other payments to accrue to the GRANTOR, his/her/their legal representatives or assigns hereunder, and the latter hereby authorizes the COMPANY to deduct and retain the amount of such advance accordingly; except the above bonus.

VII. In the event that any of the compositions above specified shall have been written by the WRITER alone, both words and music, the GRANTOR shall receive the full amount of royalty specified herein; if, written with one or more additional writers, the GRANTOR shall receive his/her/their proportionate share, viz: one-half ($\frac{1}{2}$) or one-

third ($\frac{1}{3}$) or one-fourth ($\frac{1}{4}$) of the amounts specified herein, as the case may be.

VIII. This instrument, and all its provisions, shall bind the heirs, executors, administrators and legal representatives of the GRANTOR, and inure to the benefit of and be enforceable by the successors, assigns and transferees of the COMPANY.

IX. The GRANTOR covenants and undertakes, without further consideration, except as hereinafter provided, to make, sign and ~~cause~~ to be filed the application for such renewal and extension, to cause said copyright(s) to be duly registered, and to do all other things necessary to completely effectuate the renewal and extension of said copyright(s), immediately upon the vesting of the right to such renewal and extension, or in due time in each instance and in the manner required by the existing copyright law of the United States, and/or amendments and new statutes in substitution, and hereby irrevocably appoints the COMPANY his/her/their Attorney in Fact, and in his/her/their name to perform each and every of the foregoing, and the GRANTOR further undertakes, immediately upon such renewal and extension having been effected as to each respective musical composition, to convey by written instrument duly acknowledged and delivered, the renewed and extended copyright(s) to said musical composition(s), and without cost to the COMPANY, to promptly sign, execute and deliver to the COMPANY such further documents which it may deem necessary to evidence the transfer of and thereby vest in the COMPANY the absolute ownership of each such renewed and extended copyright and all of the rights aforesaid, and hereby irrevocably appoints the COMPANY as his/her/their Attorney in Fact, to make and execute such assignment and to take any other proper or necessary steps or execute and deliver any other proper or necessary papers to fully protect the COMPANY's ownership of the copyright(s) and rights aforesaid.

X. The GRANTOR agrees that he/she/they will not assign, mortgage, or otherwise encumber this contract, or transfer to any person, firm or corporation, any sums that may be or become due hereunder without the written consent of the COMPANY first had and obtained and endorsed hereon.

XI. The COMPANY shall have the sole right to maintain any action or actions of any kind whatsoever to restrain any person, firm or corporation, from using in any manner the musical composition(s) or infringing the copyright(s) referred to herein, or to recover any damages that the COMPANY and/or the GRANTOR may sustain, as the result of the wrongful and unlawful use of the said musical composition(s), or infringement of copyright(s) and shall have the right to use the name of the GRANTOR in such action, and shall have the right to settle, adjust and compromise such action or actions, provided, however, that such suit or suits shall be instituted, brought, maintained and conducted at the joint cost and expense of the COMPANY and the GRANTOR, and any and all sums that may be received, obtained, collected or recovered in any such suit or suits whether by judgment or settlement or otherwise, shall be divided equally between the COMPANY and the GRANTOR, after deduction of all expenses of such litigation, including counsel fees.

XII. The GRANTOR, for himself/herself/themselves, his/her/their heirs, executors and administrators, covenant(s) and agree(s) to and with the COMPANY, its successors and assigns, at all times to warrant and defend the sale, assignment and transfer of said song(s) or musical composition(s), the words, music, title and copyright, and each of them, and each and every of the exclusive rights thereto and therein, against all and every person, firm or corporation whomsoever, and the GRANTOR will at all times full indemnify and save and keep harmless the COMPANY and its successors and assigns, of, from, and against any and all claims, demands, actions at law

or suits in equity, loss, damages, cost, charges, recoveries, judgments and penalties which may be obtained or recovered against, imposed upon or suffered or sustained by the COMPANY, and its successors and assigns, by reason of any violation or alleged or claimed violation of any copyright or of any musical or literary or any other rights, of any third party or parties, because of printing, publication, sale or any other use of said song(s) or musical composition(s), the words or music or title thereof, or the exercise of any of the rights hereby sold, granted and conveyed unto it. If any further assurance or covenant of title should be required or become necessary, the GRANTOR hereby obligates himself/herself/themselves to procure and furnish the same to the COMPANY at any time, upon its request, all without further cost or expense to it or its successors or assigns. The GRANTOR agrees that the COMPANY may on his/her/their behalf and its own behalf, defend, settle and adjust such suits and/or proceedings, and employ legal counsel for such purposes, and the GRANTOR will pay any and all costs, charges, fees and expenses, judgments, settlements, including fees of counsel that may have been paid or incurred in the defense or settlement of such suits or proceedings. Should the Company have paid any moneys whatsoever or incurred any obligations in connection with the matters referred to in this paragraph, it shall have the right to deduct the same from any sums that may be payable hereunder, and the GRANTOR will at all times upon demand make the same good to the COMPANY.

XIII. The GRANTOR warrants and represents that he/she/they has/have prior to the execution hereof, fully considered the value of the rights herein conveyed to the COMPANY, taking into account, amongst other things, the amounts previously derived from all sources from the said musical composition(s), and believes that the consideration, royalties and future payments herein provided, are fair and just payments for the rights herein conveyed.

XIV. If a claim is presented against the COMPANY, alleging that some other person is the owner, in whole or in part, of the rights herein conveyed by the GRANTOR, or the persons named in Paragraph XV hereof, the COMPANY shall mail written notice to the GRANTOR or said persons, and thereafter, until such claim has been adjudicated or settled, the COMPANY shall not be required to make the payments herein specified, or such part thereof as have been claimed, if the claim is of ownership of part of the rights conveyed, pending the outcome of such claims. If no suit be filed within one year after notice to the GRANTOR of the adverse claim, then payments previously withheld shall be made and payment shall continue. In the event suit is instituted, then upon such event, the COMPANY may from that time withhold payments, until the adjudication or settlement thereof. Payments made after said one year, or voluntarily made by the COMPANY prior thereto, or after the institution of action, shall be without prejudice to the rights of the COMPANY, in the event of a subsequent adverse adjudication.

XV. As a further consideration for the payments herein provided, and to induce the COMPANY to enter into this agreement MARIE WALLACE DESYLVA accept(s) and approve(s) this agreement and agree(s) that in the event the rights herein conveyed to the COMPANY shall vest in him/her/them, that he/she/they accept the terms and conditions as in this agreement set forth, and grant(s) to the COMPANY all the powers, rights and interest as set forth herein, upon such terms and conditions, and in such event, wherever the word "GRANTOR" appears herein, it shall be understood to include him/her/them.

RIDER ATTACHED

IN WITNESS WHEREOF, the parties have executed this agreement the day and year first above written.

*Songs and percentages payable to B. G. DeSylva under
Paragraph VII*

- 1925—ALABAMA BOUND— $\frac{1}{3}$
- 1927—BEHIND THE CLOUDS— $\frac{1}{2}$
- 1925—HEADIN' FOR LOUISVILLE— $\frac{1}{2}$
- 1925—IF YOU KNEW SUSIE— $\frac{1}{3}$
- 1925—IS ZAT SO— $\frac{1}{3}$
- 1925—MINE— $\frac{1}{2}$
- 1925—POLLY OF HOLLYWOOD— $\frac{1}{2}$
- 1924—ROSE MARIE— $\frac{1}{3}$
- 1925—SAVE YOUR SORROW— $\frac{1}{3}$
- 1925—WHAT DID I TELL YA— $\frac{1}{2}$
- 1926—WHY DO YOU SIT
ON YOUR PATIO— $\frac{1}{2}$

As further consideration for the GRANTOR'S execution of this agreement it is understood and agreed that the royalties herein specified are to be paid commencing with the date of this agreement in place and instead of the royalties specified in the original royalty contracts.

SHAPIRO, BERNSTEIN & Co. INC.

By: ELLIOTT SHAPIRO
vice pres

B. G. DeSYLVA

B. G. DeSylva

MARIE WALLACE DeSYLVA

Marie Wallace DeSylva

E

COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA
THE LIBRARY OF CONGRESS—Washington

The attached instrument was recorded in the assignment records of the Copyright Office,
vol. 835, pages 189-190 on June 13, 1952

ARTHUR FISHER
Register of Copyrights

APPENDIX F

November 7, 1946.

Mr. B. G. DeSylva,
C/o A. L. Berman, Esq.,
551 Fifth Avenue,
New York City.

Dear Sir:

This is to confirm our understanding with reference to the agreements between you and each of us and dated the 26th day of September, 1946 (which agreements hereinafter are referred to as the main agreements).

1. We jointly agree to pay to you the sum of \$2,000.00 at the beginning of each of ten consecutive fiscal years beginning with October 1, 1946. Said sum of \$2,000.00 shall be deemed an advance against all royalties accruing to you under the terms of both main agreements in the respective fiscal year and shall be deductible therefrom. If in any one fiscal year the royalties accruing to you under said agreements amount to more than \$2,000.00, the amount in excess of \$2,000.00 shall be withheld to make up any unearned balance remaining from previous years in said ten year period and, if there be none, said excess shall be applied as credit to the advance for the following year or years and we shall be obligated to pay to you as an advance in said following year or years an amount equal to the difference between said credit and \$2,000.00. If at the end of the ten year period aforesaid; there remains an unearned balance of \$20,000.00 in the aggregate, said balance shall be cancelled and shall not be returnable by you.

2. You agree to execute and to leave behind you a Last Will and Testament, which shall provide for an executor in the event your wife shall have predeceased you or shall cease to be your wife prior to your decease. You further agree that you will direct the executor of said

1-2

Last Will and Testament to renew all copyrights which shall come up for renewal after your death in the name of your executor and to assign each and all of such renewals of copyright to us, our successors and assigns, pursuant to and subject to the terms and conditions of the main agreements. In the event that you shall fail to leave behind you a valid Last Will and Testament providing for a corporate executor and containing the provision hereinbefore required or, in the event that such Will be left behind but shall not be probated, then in either such event we shall be relieved and released of and from any and all obligations to make the advances herein provided for.

3. In the event that for any reason whatsoever we shall not be vested by you or your wife or your executor or your next-of kin with your interests in the renewal copyrights of all the musical compositions covered by both main agreements and each and all of them, then in such event we and each of us shall be relieved and released of and from all liability to make the advances herein provided for.

Except as herein provided, the said agreements and each of them shall remain in full force and effect and unchanged.

If the foregoing correctly sets forth the understanding between us, kindly sign and return a copy of this letter.

Very truly yours,

CRAWFORD MUSIC CORPORATION

By MAX DREYFUS

T. B. HARMS COMPANY

By MAX DREYFUS

APPROVED AND AGREED TO:

B. G. DeSYLVA

(L.S.)

B. G. DeSylva

MARIE DeSYLVA

(L.S.)

Marie DeSylva

APPENDIX G

October 31st, 1946.

Mr. B. G. DeSylva,
c/o A. L. Berman, Esq.,
551 Fifth Avenue,
New York City.

Dear Sir:

This is to confirm our understanding.

The agreement between us dated the 26th day of September, 1946, (hereinafter referred to as the main agreement) is hereby modified by the addition of the following provisions.

1. We agree to pay you the sum of \$5,000.00 at the beginning of each of ten consecutive fiscal years, beginning with September 1, 1946. Said sum of \$5,000.00 shall be deemed an advance against all royalties accruing to you under the terms of the main agreement in the respective fiscal year and shall be deductible therefrom. If in any one fiscal year the royalties accruing to you amount to more than \$5,000.00, the amount in excess of \$5,000.00 shall be withheld to make up any unearned balance remaining from previous years in said ten year period and, if there be none, said excess shall be applied as credit to the advance for the following year or years and we shall be obligated to pay to you as an advance in said following year or years an amount equal to the difference between said credit and \$5,000.00. If at the end of the ten year period aforesaid, there remains an unearned balance of \$50,000.00 in the aggregate, said balance shall be cancelled and shall not be returnable by you.

2. You agree to execute and to leave behind you a Last Will and Testament, which shall provide for an executor, in the event your wife shall have predeceased you or shall

cease to be your wife prior to your decease. You further agree that you will direct the executor of said Last Will and Testament to renew all copyrights which shall come up for renewal after your death in the name of your executor and to assign each and all of such renewals of copyright to us, our successors and assigns, pursuant to and subject to the terms and conditions of the main agreement. In the event that you shall fail to leave behind you a valid Last Will and Testament providing for a corporate executor and containing the provision hereinbefore required or, in the event that such Will be left behind but shall not be probated, then in either such event we shall be relieved and released of and from any and all obligations to make the advances herein provided for.

3. In the event that for any reason whatsoever we shall not be vested by you or your wife or your executor or your next of kin with your interests in the renewal copyrights of all the musical compositions covered by the main agreement and each and all of them, then in such event we shall be relieved and released of and from all liability to make the advances herein provided for.

Except as herein amended, the said agreement shall remain in full force and effect.

If the foregoing correctly sets forth the understanding between us, kindly sign and return a copy of this letter.

Very truly yours,

MUSIC PUBLISHERS HOLDING CORPORATION
By: HERMAN STARR

APPROVED:

B. G. DeSYLVA

B. G. DeSylva

MARIE DeSYLVA

Marie DeSylva

APPENDIX H

FINK, LEVINthal & LAVERY
 6253 Hollywood Boulevard
 Los Angeles 28, California
 Hollywood 4-5135

Attorneys for Petitioner

FILED

Dec 29 1955

HAROLD J. OSTLY,

County Clerk

By Ed Roberts C

Deputy

IN THE SUPERIOR COURT OF THE STATE
 OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES.

In the Matter of the Estate and
 Guardianship of

STEPHEN WILLIAM BALLENTINE,
 also known as

STEPHEN WILLIAM MOSKOVITA,
 a Minor.

No. 263,672

ORDER CONFIRMING SALE OF
 PERSONAL PROPERTY AND
 APPROVING CONTRACT WITH
 ROSS & NICKEL, INC.

The Return of Sale of Personal Property and Petition of Marie Ballentine, as guardian of the estate and person of Stephen William Ballentine, also known as Stephen William Moskovita, a minor, for confirmation of the sale of that certain personal property hereinafter described, and for approval of that certain contract, a copy of which is hereinafter set forth, having come on regularly to be heard on the 29th day of December, 1955, in Department 4 of the above-entitled Court, the Honorable Burdette J. Daniels, Judge, presiding, and Fink, Levinthal and Lavery, by Max Fink, having appeared as counsel for the petitioner, and the Court having examined the said Re-

turn of Sale of Personal Property and Petition for Confirmation and for Approval of Contract, and the Court, having heard and considered the evidence with respect thereto and being fully advised in the premises, finds that due notice of the said Return of Sale of Personal Property and Petition for Confirmation and for Approval of Contract has been given as required by law; that all of the allegations of said petition are true; that said sale was legally made and fairly conducted; that notice of the time, place and terms of sale was duly given as required by law; and that the consideration to be paid therefor is the reasonable value of the property sold; and the Court, having examined the agreement between Stephen William Ballentine and Marie Ballentine, as guardian of the estate of the said Stephen William Ballentine, and Ross Jungnickel, Inc., a New York corporation, finds that said agreement is fair and equitable and for the best interests of the minor; and the Court finds that notice of the time and place of the hearing of the Return of Sale and Petition has been regularly given in the manner and for the period required by law,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

1. That the sale so made of the personal property herein described as all of the right, title and interest of the minor in and to the renewal rights of copyrights obtained by BUDDY DESYLVA, also known as GEORGE G. DESYLVA, deceased, during his lifetime, with respect to all of the musical works, written or composed, in whole or in part, by the said BUDDY DESYLVA, also known as GEORGE G. DESYLVA, deceased, subject, however, to certain reservations as to accountings against co-owners and others, if any, and subject, further, to reservation of a portion of the performance rights, all as set forth in the said Agreement, (a copy of which is hereinafter set forth at length), for the considerations as set forth in the said

Agreement, and upon all of the terms and conditions therein, be and the same is hereby confirmed, and upon receipt of the considerations as set forth in said Agreement and compliance with the terms of the Agreement by said ROSS JUNGnickel, Inc., the said MARIE BALLENTINE, as the Guardian of the above-named minor's estate, or any successor guardian or guardians, are directed to execute to, or for, said ROSS JUNGnickel, Inc., all necessary documents and instruments required in said Agreement. The personal property so sold is described as follows:

"All of the right, title and interest of the minor in and to the renewal rights of copyrights obtained by BUDDY DESYLVA, also known as GEORGE G. DESYLVA, deceased, during his lifetime, with respect to all of the musical works written or composed, in whole or in part, by the said BUDDY DESYLVA, also known as GEORGE G. DESYLVA, deceased, subject, however, to certain reservations as to accountings against co-owners and others, if any, and subject, further, to reservation of a portion of the performance rights".

2. That the Agreement dated September 2, 1955, by and between STEPHEN WILLIAM BALLENTINE and MARIE BALLANTINE, as Guardian of the Estate of Stephen William Ballentine, and ROSS JUNGnickel, Inc., a New York corporation, in words and figures, as follows:

"AGREEMENT

AGREEMENT made this 2nd day of September, 1955, by and between STEPHEN WILLIAM BALLENTINE (hereinafter referred to as "Ballentine") and MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine (hereinafter referred to as "the Guardian"), care of MAX FINK, 6253 Hollywood Boulevard, Hollywood 28, California, and ROSS JUNGnickel, Inc., a New York cor-

poration, 1650 Broadway, New York 19, New York,
(hereinafter referred to as "the Publisher")

WITNESSETH:

WHEREAS, the guardian has heretofore instituted on behalf of Ballentine, a certain action in the United States District Court for the Southern District of California against Marie DeSylva, widow of George G. DeSylva, professionally known as Buddy DeSylva, B. G. DeSylva and Bud DeSylva (hereinafter referred to as "Buddy DeSylva") for the purpose of asserting his claim that he is the son of said Buddy DeSylva, and as such is entitled to an interest in and to all of the United States renewal rights of copyrights in the works written by Buddy DeSylva; and

WHEREAS, the United States Court of Appeals for the Ninth Circuit, Case No. 13,880, on or about August 25, 1955 (which Publisher has read) rendered its decision directing the United States District Court to enter its judgment in favor of said Ballentine, proclaiming him to be the son of Buddy DeSylva under the Copyright Act, and entitled to an equal interest with the said Marie DeSylva in the renewal rights in the works of Buddy DeSylva after his death; and

WHEREAS, MAX FINK, CYRUS LEVINthal and LEON E. KENT (hereinafter jointly and severally referred to as "Attorneys") have heretofore acquired an interest in Ballentine's rights in the Works, and whereas said Attorneys will join in the conveyances herein provided, and

WHEREAS, the Publisher desired to obtain an assignment of all of Ballentine's (as well as Attorneys') right, title and interest in and to the musical compositions written in whole or in part by the said Buddy DeSylva, except as herein otherwise provided,

IT IS AGREED:

FIRST:

A. Ballantine hereby bargains, sells, transfers, assigns and sets over to the Publisher without reservation or limitation, except as hereinafter stated, all of his right, title and interest heretofore, now, or at any time or times hereafter known or which at any time or times heretofore or hereafter shall be, or have been acquired or possessed by him with respect to the United States renewal copyrights, including any and all claims and demands accrued or to accrue with respect to all of the musical works written or composed in whole or in part by Buddy DeSylva, and any and all rights with respect to foreign copyrights to the musical works. This said grant of all of Ballantine's right, title and interest includes any and all adaptations, arrangements, translations or versions thereof and all renewals and extensions of the copyrights in the said musical works for and during every period in respect of which copyrights may subsist and in any and all renewals and extensions thereof beyond the original terms thereof throughout the world, together with the right, power and authority to make any versions, omissions, additions, changes, dramatizations and translations of, in and to the aforementioned compositions and the title, words and music thereof, to the full extent of Ballantine's right, title and interest.

B. It is specifically understood that Ballantine is herein transferring, relinquishing and conveying only Ballantine's past, present and future rights with respect to the aforesaid works, and that Ballantine has not herein transferred, relinquished or conveyed any right or rights of any and all other persons, firms or corporations who have any right or interest in or to the said works.

SECOND:

Ballantine hereby bargains, sells, transfers, assigns and sets over to the Publisher without reservation or limita-

tion, except as hereinafter stated, any and all rights, title or interest of Ballentine in and to the foreign copyrights to the musical works written or composed in whole or in part by Buddy DeSylva, to which he may have heretofore or hereafter be declared to hold an interest by reason of being the son of Buddy DeSylva.

THIRD:

Ballentine and the Guardian hereby represent and warrant that neither Ballentine nor the Guardian have heretofore sold, assigned, leased, licensed, transferred, encumbered, hypothecated or otherwise disposed of, in whole or in part, any portion of the rights in and to said musical compositions by Buddy DeSylva hereby bargained, sold, transferred, assigned and set over to Publisher pursuant to this agreement, except to Attorneys.

FOURTH:

In consideration of the terms hereof and the grants in this agreement contained, Publisher will pay or cause to be paid to Ballentine and Attorneys (as their respective interests hereafter appear) during all subsisting, renewals and/or extensions of the United States and foreign copyrights in said compositions, the following considerations, compensations, royalties and fees, as follows:

A. (i) The Publisher agrees to pay a sum equal to ten (10%) percent of the Publisher's share of its net receipts from the American Society of Composers, Authors and Publishers with respect to identifiable logged performances for profit with respect to all of the Buddy DeSylva works which are the subject of this agreement. As a non-returnable advance against the ten (10%) percent payments to be made by the Publisher under this paragraph FOURTH (A) (i), Publisher agrees to pay the sum of One Hundred Thousand (\$100,000.00)

Dollars, subject to the following terms and conditions:

(a) \$25,000.00, which said sum shall be payable upon the execution of this agreement by Ballentine's legally appointed guardian, pursuant to the order and with the approval of the Superior Court of the State of California, in and for the County of Los Angeles, in said Ballentine's Guardianship Estate, and execution of this agreement by Attorneys.

(b) \$25,000.00 on January 15, 1956.

(c) \$50,000.00 by monthly payments of \$1,400.00 commencing February 15, 1956, and a like sum upon the 15th day of each and every month thereafter until fully paid.

(ii) Anything to the contrary in this paragraph FOURTH (A) notwithstanding, it is specifically understood and agreed that the payments provided for in this paragraph FOURTH (A)(1)(b) and (c) shall not become due and payable until the decision of the United States Court of Appeals for the Ninth Circuit, in the case of *Marie Ballentine v. Marie DeSylva*, case No. 13,880, is ultimately confirmed by the happening of any of the following events:

(a) Marie DeSylva fails to seek a review in the Supreme Court of the United States within the time allotted therefor by law, making the present decision final;

(b) A petition for review to the United States Supreme Court by Marie DeSylva is denied; or

(c) The Supreme Court of the United States confirms in all respects the present decision of the United States Court of Appeals for the Ninth Circuit in the aforementioned *Ballentine v. DeSylva* case.

(iii) In the event Marie DeSylva petitions for re-hearing in the United States Court of Appeals, Ninth Circuit, in the matter of *Ballentine v. DeSylva*, supra, and such petition is granted, with the ultimate result in the Ninth Circuit of a reversal, in whole or in part, of the aforementioned present decision, the payments provided for by this paragraph FOURTH, except FOURTH (A)(i)(a), shall not be payable until such time as Ballentine has obtained a result of such litigation in the Circuit Court of Appeals or the Supreme Court of the United States favorable to him substantially as such result is expressed in the present decision of the Ninth Circuit Court of Appeals in the aforementioned case, with respect to his rights in the renewal of copyrights. It is the general intention of this agreement that no payments beyond the first \$25,000.00 payment provided for in this paragraph FOURTH shall be made unless and until the co-ownership rights of Ballentine, as stated in the present decision of the United States Court of Appeals, Ninth Circuit, shall be finally confirmed, without recourse.

(a) In the event the Circuit Court of Appeals, on a petition for re-hearing, reverses its present decision, Ballentine agrees to take all necessary steps for the purpose of obtaining a review of such decision in the Supreme Court of the United States.

(iv) In the event payments under this paragraph FOURTH are postponed due to the fact that neither of the three events contemplated by sub-paragraph (ii) (a), (b) and (c) occur prior to the payment due dates of any installment payments, and ultimately one of those three events does occur, the aforesaid postponed payments shall be deemed accumulative and upon the happening of any one of the three

said events, all accumulated payments shall forthwith be due and payable.

(v) Anything in this agreement to the contrary notwithstanding, it is specifically understood that in the event the Supreme Court of the United States should reverse the present decision of the United States Court of Appeals for the Ninth Circuit in any respect with reference to the case of *Ballentine v. DeSylva*, supra, or if a rehearing of such case is granted by the United States Court of Appeals, Ninth Circuit, resulting in a decision substantially different in any respect from the present decision with respect to Ballentine's rights in the renewal of copyrights; and such different decision is not thereafter reversed, either by appeal to the Supreme Court of the United States or by other rehearing in the Circuit Court of Appeals so that ultimately the rights of Ballentine shall be declared to be other than what they are under the present Court of Appeals' decision, the Publisher shall have no obligation to make any payments other than the first payment of \$25,000.00 as provided for in this paragraph FOURTH (A)(i)(a).

The said sum of \$25,000.00 hereinabove provided to be paid pursuant to the provisions of subdivision (i)(a) of division (A), of paragraph FOURTH shall be paid by Publisher, irrevocably, and Publisher shall not under any circumstances be entitled to the return thereof. In the event that the United States Court of Appeals should alter its decision, or the United States Supreme Court shall render a decision in the present cause to such an extent that it is determined that the minor child does not have the rights in the renewal of copyrights in said present decision described, then, and in such event, Publisher may, in its discretion, abandon this agreement, in which event Publisher shall have no further

duty with respect to the terms and provisions hereof; provided, however, that in the event that Publisher shall nevertheless determine to make use of such rights and privileges as may be finally determined to vest in Ballentine (although less than the rights described in the present decision of the Court), Publisher may do so, and its obligations to pay shall be reduced proportionately to the reduction in the quantum or extent of rights which Ballentine and Attorneys have the right to convey to Publisher pursuant to the terms hereof, and, in the event that the parties cannot agree upon the amount of such reduction, the same shall be submitted to arbitration in Los Angeles, California, in accordance with the rules of the American Arbitration Association and pursuant to the laws of the State of California.

B. In addition to the foregoing, Publisher shall pay or cause to be paid to Ballentine and Attorneys sums to be computed as follows:

(i) Six (6¢) cents for each regular piano copy and for each orchestration of said compositions sold by the Publisher, its affiliates, subsidiaries or assigns, paid for and not returned in the United States, plus,

(ii) Fifty (50%) percent of all net moneys received by the Publisher, its affiliates, subsidiaries and assigns, for its own use and benefit from licenses issued by it (1) for the recording on phonograph records, music rolls and electrical transcriptions for broadcasting; and (2) for the recording in synchronization with sound motion pictures; and (3) of any and all receipts of the Publisher, except as provided in Paragraph Fourth (A) (i), from any other source or right now known or which may hereafter come into existence for

which specific provision is not made in this instrument; provided, however, that Ballentine and Attorneys shall not be entitled to any share of the monies distributed to the Publisher by the American Society of Composers, Authors and Publishers, or any other performing rights society throughout the world which makes a distribution to writers either directly or through the American Society of Composers, Authors and Publishers of an amount which, in the aggregate, is at least equal to the aggregate amount distributed to publishers.

(iii) If a composition or any part thereof is included in any song book, song sheet, folio or similar publication issued by the Publisher, containing at least four (4) but not more than twenty-five (25) musical compositions, the royalty to be paid by the Publisher shall be an amount determined by dividing ten (10%) percent of the wholesale selling price (after trade discounts, if any) of the copies sold, among the total number of the Publisher's copyrighted musical compositions included in such publication. If such publication contains more than twenty-five (25) musical compositions, the said ten (10%) per cent shall be increased by an additional one-half ($1\frac{1}{2}\%$) percent for each additional musical composition.

C. With respect to the sums hereinabove in said paragraph (B) hereof provided to be paid to Ballentine and Attorneys, it is specifically understood that Publisher will pay only a proportionate share thereof in proportion to the total number of writers and composers (irrespective of whether or not Publisher has acquired or may acquire their rights and interests therein) to whom Publisher may be required to account. Publisher shall be deemed to be required to account to such other writers and composers, within the meaning hereof, in the event

that Publisher shall be required to account to their assigns, publishers, heirs at law and others who may acquire an interest in the copyrights of the works and renewals thereof.

It is contemplated that the exact nature of Publisher's duty to account to others with respect to the foregoing may not be known until all periods of the statute of limitations for actions have expired, and it is therefore understood that Publisher shall have the right to withhold payment to Ballentine on any and all amounts payable pursuant to the provisions of paragraph (B) above, which, in the exercise of Publisher's reasonable discretion, Publisher may possibly be caused to pay to others until any and all actions with respect thereto have been terminated or other agreement is made with respect thereto, or until expiration of any and all periods of limitation with respect to the filing of actions regarding the same, whichever event may first occur. Any and all sums payable pursuant to the provisions of paragraph (B) above which are thus withheld by Publisher pursuant to the provisions of this paragraph shall be placed by Publisher in a special and separate trust account; provided, however, that Publisher is hereby authorized to at all times pay from such trust funds one-half ($\frac{1}{2}$) of any and all expenses, including counsel fees, which Publisher may incur in connection with any and all proceedings occurring for the purpose of determining the relative rights and corresponding duties concerning the funds thus withheld. The foregoing shall not apply to the Publisher's share of any and all earnings, and shall only apply to funds which may eventually become payable pursuant to the provisions of paragraph (B) above. Publisher agrees that with respect to such portions of its income from said musical compositions not paid to Ballentine and Attorneys, Publisher will

indemnify and save Ballentine and Attorneys free and harmless of and from all actions, claims or demands of any persons, firms or corporations, including Marie DeSylva, based upon any claim of ownership in the copyrights of said compositions for an accounting with respect to said income not paid to Ballentine and Attorneys, and any and all reasonable counsel fees and costs expended by Ballentine and Attorneys in the defense of same (provided, however, that in the event of suit with respect thereto, Ballentine or Attorneys shall give notice to Publisher who shall thereupon have the right to assume the defense thereof).

Without in any manner limiting the foregoing, it is agreed that the royalties and compensation provided to be paid pursuant to the provisions of paragraph (B) above shall likewise be reduced by one-half ($\frac{1}{2}$) with reference to all of said compositions, the renewal rights to which vest (reach their 28th year) during the lifetime of Marie DeSylva; provided, however, that in the event Publisher shall not be required to account to said Marie DeSylva, or her successors or assigns, then; and in such event, such reduction shall not be made and, provided further, that the actual reductions shall be limited to the net amount which Publisher may be required to thus pay, after taking into consideration offsets and cross accountings which may be had.

Anything in provision (B) above to the contrary notwithstanding, payment by the Publisher to all such other writers and composers of said compositions, *other than in instances when Publisher is required to account by operation of law*, shall be conditioned upon the Publisher having acquired or acquiring their respective interests in said compositions for the renewal period of copyright, the amount of all such payments to be the amount, if any, specified in the respective instruments under which such rights were or are acquired by the Publisher.

FIFTH:

Subject to the provisions of provision SIXTH, it is understood that the rights granted by Ballentine hereunder are in each case co-ownership rights and it is contemplated that the Publisher may seek accounting from the remaining co-owners of the copyrights which are the subject of this agreement. In the event of any recovery by Publisher under such accounting proceedings, Publisher shall pay to Ballentine and Attorneys a sum equal to fifty (50%) percent of its net receipts therefrom. Publisher shall be entitled to deduct, in computing such net receipts, all necessary costs of such proceedings, including but not limited to attorneys' fees and court costs. Publisher need not account under this paragraph with respect to any recovery made by it with reference to performing fees, except as hereinafter provided.

SIXTH:

Without in any manner limiting the foregoing, the parties agree that the performing rights will be licensed to ASCAP and other similar societies from time to time existing, and this agreement shall be subject to existing and future agreements between any of the parties hereto and such societies.

Anything contrary to the foregoing notwithstanding, it is specifically understood that Ballentine and Attorneys have reserved from the terms hereof any and all rights necessary to be conveyed by Ballentine or Attorneys to such performing rights organizations and societies, including ASCAP, in order and to the extent that Ballentine or Attorneys (or both) may enjoy the writer's share of performance income in accordance with the present custom in the industry and, provided further, that under any and all circumstances Publisher shall likewise have all rights necessary to the enjoyment of the publisher's share of such performance income, in accordance with the present custom of the industry.

Anything contrary to the foregoing notwithstanding, it is specifically understood that Ballentine and Attorneys have reserved from the terms of this agreement all demands and rights of recovery which Ballentine has or may hereafter have against said ASCAP and other performing rights societies, Marie DeSylva, and others, with respect to so-called authors' and composers' shares of the income from performance of the compositions, and have likewise reserved from the terms of this agreement the following:

A. All rights of accounting and recovery with respect to any and all income heretofore received by Marie DeSylva; and

B. All rights to accounting and recovery against Marie DeSylva with respect to income which said Marie DeSylva may hereafter receive or be entitled to receive by reason of agreements which she has entered into with publishers for the publication of compositions, but only with respect to copyrights which have been renewed since the date of death of said Buddy DeSylva and prior to September 2, 1955; provided, however, that if Marie DeSylva has not assigned the copyrights to such compositions to such publishers, then, and in such event, and with respect to income resulting from compositions for which the copyrights have not been assigned by Marie DeSylva to such publishers, one-half ($\frac{1}{2}$) of the net (after legal and auditing expense) of such recovery shall be held by Ballentine and Attorneys for the benefit of Publisher and be paid over to the Publisher.

All payments provided to be made pursuant to the terms of this agreement by Publisher to Ballentine and Attorneys shall be made by Publisher and distributed to

the respective parties and in the respective percentages, as follows:

Ballentine	65% thereof;
Max Fink	21.32% thereof;
Cyrus Levinthal	9.13% thereof;
Leon E. Kent	4.55% thereof.

SEVENTH:

Ballentine and the Guardian hereby covenant, undertake and agree to make, execute and deliver any and all further instruments, documents and writings that may be requested by the Publisher, its successors and assigns, including an assignment in the form marked "EXHIBIT A" hereto attached, for the purpose of perfecting and confirming in the Publisher the rights and interests in all renewals and extensions of the copyrights, including subsisting copyrights, in said compositions, throughout the world vested by Ballentine in the Publisher under this agreement, and Ballentine hereby nominates and appoints the Publisher, and its each and every successor and assign, the true and lawful attorney of Ballentine to make, execute and deliver any and all such instruments, documents and writings in the name of Ballentine, and to renew and extend the copyrights in said compositions and to make applications therefor in the name of Ballentine, or the Publisher, or otherwise, as in every such case made and provided, for and on behalf of the Publisher, as the real party in interest therein. The said power is coupled with an interest and is irrevocable.

EIGHTH:

It is specifically understood and agreed that the Publisher will print copies of the compositions which are subject to this agreement only when in its absolute discretion it deems such printing to be advisable.

NINTH:

The Publisher shall render to Ballentine and Attorneys hereafter, royalty statements accompanied by remittance of the amount due on or before each August 15th, covering the six (6) months ending December 31st. Ballentine or Attorneys may at any time, or from time to time, make written requests for a detailed royalty statement and the Publisher shall, within sixty (60) days, comply therewith. Such royalty statements shall set forth in detail the various items for which royalties are payable thereunder, and the amounts thereof, including but not limited to the number of copies sold and the number of uses made in each royalty category.

TENTH:

It is specifically understood and agreed that all of the grants and assignments herein made and given are given subject to and upon condition that each and all of such accountings shall be truly and accurately rendered, and each and all such payments herein provided to be made shall be made at the time and in accordance with the provisions hereof, and, in the event of the failure on the part of Publisher, or any of its assigns, to properly pay and account in accordance with the terms hereof, and, in the event that such failure shall continue for a period of forty-five (45) days after written notice thereof given to Publisher, and its assigns (to the extent herein limited), then, and in such event, this agreement shall terminate and all rights of Publisher in and to the compositions and copyrights herein granted shall lapse and all of the same shall thereupon revert to Ballentine (and Attorneys, as their interests may appear), and Publisher (and its assigns) shall have no further right, title and interest therein. It is specifically understood that in the event that a dispute shall arise between Publisher and Ballentine or Attorneys with respect to any and all sums which Ballentine or Attorneys may claim in writing to be payable, then, and in such event, and pending the determination of such dispute,

Publisher may deposit the disputed funds in trust to be thus held in such separate trust account until the determination of such dispute by arbitration, in accordance with the rules of the American Arbitration Association and, in such event, the failure to pay such sum during the pendency of any such dispute shall not be cause for termination of this agreement as hereinabove provided. In this respect, Publisher agrees, for itself and its assigns, to execute any and all documents, instruments and agreements necessary to re-vest in Ballentine (and Attorneys, as their interest shall appear) all rights granted pursuant to the terms hereof, and Publisher does hereby irrevocably appoint Ballentine and Attorneys, and each of them, its attorney in fact to execute any and all such instruments, documents and agreements in the event Publisher shall fail so to do.

Without in any manner limiting the foregoing, it is specifically agreed that Publisher may not assign any right obtained by Publisher pursuant to the terms of this agreement, except upon conditions, as follows:

A. That Publisher shall give notice, in writing, to such assignee prior to the time of any such assignment of the pertinent terms and provisions hereof relating to the payment of any and all sums which may thereafter be or become due to Ballentine, and the requirements relative to rendition of accountings hereunder, and

B. Publisher shall deliver to Ballentine and Attorneys prior to any such assignment, notice, in writing, of Publisher's intention to assign, and the name and address of such assignee. In the event of voluntary or involuntary bankruptcy of Publisher, or in the event Publisher assigns all of its assets for the benefit of creditors, this contract shall lapse and terminate and all rights shall revert to Ballentine.

ELEVENTH:

The Publisher shall, from time to time, upon written demand of Ballentine or Attorneys permit Ballentine, or Attorneys, or their representative, to inspect, at the place of business of the Publisher, all books, records and documents relating to uses and payments made by manufacturers of commercial phonograph records and music rolls, and Ballentine, or Attorneys, may appoint a Certified Public Accountant who shall at any time during usual business hours have access to all records of the Publisher relating to the subject compositions for the purpose of verifying royalty statements rendered, or which are delinquent under the terms hereof.

TWELFTH:

Publisher shall, at all times and from time to time, have the right to obtain insurance upon the life of said minor child (Ballentine) in such amounts and with such companies as Publisher may from time to time determine, and Ballentine agrees that said child will at all reasonable times cooperate for the purpose of obtaining such insurance. In the event that Publisher shall obtain insurance on the life of Ballentine and shall thereafter determine to abandon the same, Publisher agrees to assign any right, title and interest of Publisher therein to Ballentine and Ballentine thereafter may retain such insurance, if any, for Ballentine's use and benefit; provided, however, if such insurance has a cash surrender value, or dividends and interest accrued and payable, Publisher shall not be obligated to assign such insurance unless concurrently Ballentine pays Publisher an amount equal to such cash surrender value, dividends and interest.

THIRTEENTH:

A. In the event of litigation between the parties concerning their relative rights and duties pursuant to the terms of this agreement, and otherwise, then, and in such

event, the prevailing party in such litigation shall be entitled to recovery of reasonable counsel fees and court costs against the other party.

B. (i) Until otherwise notified in writing, any and all accountings, payments, notices and demands which Publisher may be required or may desire to give to Ballentine and Attorneys shall be given by registered mail, return receipt requested, addressed to Ballentine and Attorneys, care of Max Fink, 6253 Hollywood Boulevard, Hollywood 28, California, or to such other address as may from time to time be indicated by notice, in writing, given, as hereinabove provided, to Publisher.

(ii) Any notices or demands which Ballentine or Attorneys may desire to give to Publisher and its assigns (as herein limited) shall be given by addressing the same to Publisher by registered mail, return receipt requested, addressed to 1650 Broadway, New York 19, New York, or to such other address as Publisher may from time to time, by written notice given, as in the manner above required, to Ballentine and Attorneys.

(iii) Notice in each instance shall be deemed to be given five (5) days after deposit in the United States Mail.

FOURTEENTH:

Ballentine agrees to pursue Ballentine's remedies in the United States District Court to the extent reasonably necessary in order to effectuate the decision of said United States Court of Appeals.

FIFTEENTH:

This agreement shall be binding upon the execution hereof, subject only to approval of the Superior Court of the State of California, in and for the County of Los

Angeles, and Ballentine agrees, in good faith, to submit the same to the Court for its consideration and approval in the proceedings in said Court entitled, "In the Matter of the Estate and Guardianship of STEPHEN WILLIAM BALLENTINE, also known as STEPHEN WILLIAM MOSKOVITA, a Minor", and bearing No. 310665 in the records and files of said Court. In the event the Court shall approve this agreement, then, and in such event, the same shall be incorporated in the order of approval of the said Court. In the event the Court shall deny or otherwise refuse approval of this agreement, then, and in such event, the same shall be rendered null and void and of no effect. Without in any manner limiting the foregoing, it is specifically understood that for and in consideration of the execution of this agreement and the promise upon the part of Ballentine to submit the same to and for the approval of the said Court, Publisher shall be and remain bound by the terms hereof, unless or until the Court shall deny approval thereof, or otherwise fail to approve the same. Publisher represents that it has deposited the sum of Twenty Five Thousand (\$25,000.00) Dollars with the law firm of GANG, KOPP & TYRE, of Los Angeles, California, with directions to pay the same in accordance with the terms of this agreement immediately upon the approval of same, as hereinabove provided, by said Court.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first above written.

s/ MARIE BALLENTINE

Marie Ballentine, individually and on behalf of and as Guardian of the Estate of Stephen William Ballentine, a minor.

ROSS JUNGNIKE, INC.,

By: s/ JOACHIM JEAN ABERBACH
V. Pres.

MAX FINK, CYRUS LEVINTHAL and LEON E. KENT, in the foregoing agreement; and herein jointly and severally referred to as "Attorneys", and in consideration of the foregoing, and in order to induce the said ROSS JUNG-NICKEL, INC., to enter into the said agreement, do hereby join in each and all of the terms of the foregoing agreement and do hereby grant to said ROSS JUNG-NICKEL, INC. each and every right, to the extent that Attorneys may have, hold or hereafter acquire the same, similar to and consistent with the rights hereinabove granted by "Ballentine" to Publisher, and do hereby reserve all rights similar to and consistent with the rights reserved by "Ballentine" in the foregoing agreement; and

Attorneys, and each of them, covenant, undertake and agree to make, execute and deliver any and all further instruments, documents and writings that may be requested by the Publisher, its successors and assigns, including assignments in the form marked "EXHIBIT A", hereto attached, for the purpose of perfecting and confirming in the Publisher the rights and interests in all renewals and extensions of the copyrights, including subsisting copyrights, in said compositions, throughout the world vested in the Publisher under this, as well as under the foregoing agreement, and Attorneys, and each of them, hereby nominate and appoint the Publisher and its each and every successor and assign the true and lawful attorney for Attorneys to make, execute and deliver any and all such instruments, documents and writings in the name of Attorneys to such extent as may be or become necessary or convenient to vest in the Publisher each and every right herein granted. The said power is coupled with an interest and is irrevocable.

s/ MAX FINK
Max Fink

s/ CYRUS LEVINTHAL
Cyrus Levinthal

s/ LEON E. KENT
Leon E. Kent

State of California,
County of Los Angeles—ss.:

On November 21, 1955, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Marie Bellentine, known to me to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same.

WITNESS my hand and official seal.

s/ CYRUS LEVINTHAL
Notary Public in and for said
County and State.

State of New York,
County of New York—ss.:

On this 2nd day of September, 1955, before me, the undersigned, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Joachim Jean Aberbach known to me to be the Vice-Pres. of the corporation that executed the within and foregoing instrument, and known to me to be the person who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same.

WITNESS my hand and official seal.

s/ LEWIS A. DREYER
Notary Public in and for said County
and State.

LEWIS A. DREYER
Notary Public, State of New York
No. 30-102345

Qualified in Nassau County
Commission Expires March 30, 1959.

State of California,

County of Los Angeles—ss.:

On November 21, 1955, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Max Fink, Cyrus Levinthal and Leon E. Kent, known to me to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same.

WITNESS My hand and official seal.

s/ SIDNEY R. SCHWARTZ

Notary Public in and for said County
and State.

My Commission Expires Jan. 24, 1959.

ASSIGNMENT

The undersigned, Stephen William Ballentine, Marie Ballentine, as guardian of the Estate of Stephen William Ballentine, Marie Ballentine, Max Fink, Cyrus Levinthal and Leon E. Kent, all in care of Max Fink, 6253 Hollywood Boulevard, Hollywood, California (hereinafter referred to jointly and severally as "the Assignors"), hereby sell, assign and transfer to Ross Jungnickel, Inc., a New York corporation, located at 1650 Broadway, New York, N. Y., all their right, title and interest, including a y and all claims and demands accrued or to accrue, with respect to the copyright or rights derived under copyright of musical compositions written in whole or in part by George G. DeSylva, also known as Buddy DeSylva and Bud DeSylva, subject to and in accordance with the terms and conditions of a certain agreement between the Assignors and Ross Jungnickel, Inc., dated September 2, 1955.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this _____ day of _____, 1955.

Witness _____ Stephen William Ballentine

Witness _____ Marie Ballentine, as guardian of the estate of Stephen William Ballentine

Witness _____ Marie Ballentine

Witness _____ Max Fink

Witness _____ Cyrus Levinthal

Witness _____ Leon E. Kent

(Acknowledgment).

EXHIBIT "A"

is hereby approved and the execution of said Agreement by said Guardian is hereby approved, and said Guardian, and any successor guardian, or guardians, is hereby directed to comply with the terms and provisions thereof.

3. That said Marie Ballentine give additional bond in the sum of Fifteen Thousand Dollars (\$15,000.00).

The Clerk is directed to enter this decree.

Dated this 29th day of December, 1955.

DANIELS
Judge of the Superior Court.

MAR 8 1956

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 529

MARIE DESYLVA,

Petitioner,

vs.

MARIE BALLENTINE, as Guardian of the Estate of
Stephen William Ballentine,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF FOR MOTION PICTURE ASSOCIATION OF
AMERICA, INC. AS AMICUS CURIAE**

MORRIS EBENSTEIN,
321 West 44th Street,
New York 36, N. Y.

*Attorney for Motion Picture Association
of America, Inc.*

FRANK E. ROSENFELT,
1540 Broadway,
New York, New York

STANLEY ROTHENBERG,
729 Seventh Avenue,
New York, New York

MELVILLE NIMMER,
5451 Marathon Street,
Hollywood 38, Calif.

Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

MARIE DESYLVA,

Petitioner,

vs.

MARIE BALLENTINE, as Guardian of the
Estate of Stephen William Ballentine,
Respondent.

No. 529

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF FOR MOTION PICTURE ASSOCIATION OF
AMERICA, INC.**

OPINIONS BELOW.

The opinion of the District Court (R. 29-32) is not reported. The majority opinion (R. 47-67) of the United States Court of Appeals for the Ninth Circuit is reported at 226 P. 2d 623 and dissenting opinion (R. 67-71) of Mr. Justice Fee therein is reported at 226 P. 2d 634.

JURISDICTION

The judgment of the district court in favor of defendant and against plaintiff, was entered on April 29, 1953 (R. 34). The judgment of the United States Court of Appeals, Ninth

Circuit, reversing the judgment of the district court, was entered August 25, 1955 (R. 72). No petition for rehearing of said cause in that court was filed. Petitioner petitioned for certiorari, the petition being No. 529, and such petition was granted January 9, 1956 (R. 73).

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. When an author is not living, is his widow entitled to renewals of copyrights in his works accruing during her lifetime, and his children entitled thereto only if there is no widow living when rights to renew copyrights in his works accrue?

2. When the Copyright Act, 17 U. S. C. 24, grants the renewal copyright to "children" does it include illegitimates?

STATUTE INVOLVED

The statutory provision involved in this case is section 24 of the Copyright Act, Act of July 30, 1947, C. 391, 61 Stat. 652, 17 U. S. C. 24, as set forth below:

Sec. 24. Duration; Renewal and Extension.—The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise

than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children, be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

STATEMENT OF THE CASE

George G. DeSylva, who died July 11, 1950, was an author and composer of musical works, many of which were copyrighted during the last 28 years of his life. Therefore, since his death, a number of copyrights came up for renewal and were renewed by Marie DeSylva, his widow

and petitioner in this action, and other copyrights will, in the future, come up for renewal (R. 4, 5, 12).

Marie Ballentine, as the mother, and guardian of the estate, of Stephen William Ballentine, filed a complaint in the District Court on August 8, 1952, contending that Stephen William Ballentine, an acknowledged illegitimate child of George G. DeSylva, was equally entitled with Marie DeSylva, widow of George G. DeSylva, to the renewals and extensions of said copyrights and prayed for a declaratory judgment and for an accounting (R. 3-7).

Petitioner, on January 7, 1953, filed her answer therein, contending that in accordance with the provisions of 17 U. S. C. 24 relating to the extensions and renewals of copyrights, she, as the widow of George G. DeSylva, is the sole owner of the renewals and extensions of copyrights in the late George G. DeSylva's works accruing during her lifetime and that the said Stephen William Ballentine is not a child of the deceased, George G. DeSylva, within the meaning of 17 U. S. C. 24.

In a judgment entered April 29, 1953, the District Court held that in accordance with 17 U. S. C. 24 so long as petitioner, Marie DeSylva, is alive, she, as the widow of George G. DeSylva, is the sole owner of renewals and extensions of copyrights accruing during her lifetime in works by George G. DeSylva and that respondent has no right to an accounting as a result of renewals and extensions of copyrights obtained by petitioner, nor will the respondent have any right to an accounting as to any renewals accruing in the future so long as Marie DeSylva is alive (R. 33, 34).

Respondent appealed from this judgment (R. 35).

In its findings of fact and conclusions of law filed in support of this judgment, the District Court found that

the respondent herein is "a child of George G. DeSylva, the deceased, within the meaning of the statutes of the United States relating to the renewal of copyrights" (R. 29-32): Petitioner appealed from this conclusion (R. 35).

Both appeals were decided against petitioner in the decision of the United States Court of Appeals for the Ninth Circuit, (R. 47-67) Judge Fee dissenting on jurisdictional grounds (R. 67-71).

SUMMARY

Where an author dies and leaves surviving a widow and children, the widow is entitled to the renewals accruing during her lifetime, and the children are entitled only to the renewal copyrights which accrue after the death of the widow. The principal support for the validity of this proposition can be found in the plain meaning of the language of the renewal provision of the copyright statute itself. Additionally, the legislative history of the renewal section of the copyrights statute confirms that the widow has the exclusive right to the renewal copyright. The principal users of copyrights have relied upon the soundness of this statement of the law which is to be found in the cases and text-books.

The term "children", in the renewal provision of the copyright statute does not include illegitimates. Common law does not accord recognition to illegitimate children and this doctrine has been adopted with respect to federal statutes unless a different intention is clearly manifested.

Because of competitive factors and the extensive investment involved in the production of a motion picture, producers of motion pictures must obtain a grant of exclusive motion picture rights. However, by virtue of the

decision of the Court of Appeals for the Ninth Circuit, it would be almost impossible for them to be certain that a grant of exclusive rights for the renewal period had been secured since in clearing such rights there is no procedure available for ascertaining the identity of, or procuring a grant of rights from, illegitimate children.

Should this Court hold that children have a contingent interest in the renewal copyright together with the contingent widow the ability of an author to market a literary property in the final years of its original term of copyright will be seriously affected. The renewal provisions of the copyright statute should be construed from the viewpoint of what is most advantageous for the author while he is still alive. To grant the widow exclusive priority with respect to the renewal copyright would have this result.

ARGUMENTS

I.

THE WIDOW OF A DECEDENT AUTHOR IS ENTITLED TO THE RENEWALS OF COPYRIGHTS IN HIS WORKS ACCRUING DURING HER LIFETIME, AND ONLY IF THERE IS NO WIDOW LIVING WHEN THE RENEWAL COPYRIGHTS ACCRUE ARE HIS CHILDREN ENTITLED THERETO.

A. The intention of Congress is sought primarily in the language used. Where this language expresses an intention reasonably intelligible and plain, it must be accepted without resort to construction or conjecture. *Thompson v. U. S.*, 246 U. S. 547 (1918). In commenting upon the renewal provisions of the copyright statute shortly after its enactment, Assistant Attorney General Fowler stated:

"Each of these sections is specific in its terms and leaves but little or no room for construction."
28 Op. Attys. Gen. 162, 164 (1910).

The Court must take notice of the fundamental and unalterable fact that this section of the statute employs the word "or" and not the word "and" in providing that "the widow, widower or children" shall be entitled to the renewal and extension of the copyright.

A federal statute with an analogous clause containing both "and" and "or" in a dispositive clause was considered in *Cutting v. Cutting*, 6 Fed. 259 (C. C., D. Oreg., 1881).

In that case under Section 4 of the Donation Act, it was provided that where the donees thereunder were married persons, "and either shall have died before the patent issued, *the survivor and children or heirs of the deceased* shall be entitled to the share or interest of the deceased in equal proportions . . ." (p. 261) (emphasis added).

The donee died and left surviving him a widow and children. The Court ruled that the widow shared the interest of the deceased donee equally with the children. With respect to the phrase "or heirs" the Court stated:

"The heirs whoever they may be, can only take in default of children. The act substitutes them for children in case there are none of the latter."
(p. 267).

The Court thus construed "and" as "and" and "or" as "or", and found its guide for the determination of the proportionate shares to be taken by each beneficiary in the statute itself.

If the word "or" is construed in the conjunctive so that the widow and children are entitled as a class to the renewal copyright, then resort to statutory construction would become necessary to determine the proportionate shares that each would take.

Furthermore, as shown in the briefs of the petitioner and the *amicus curiae* Music Publishers Protective Association,³ the legislative history of this section of the copyright statute confirms that the widow has the exclusive right to the renewal copyrights, accruing during her lifetime.

B. Although the Courts have not been called upon to decide the precise question in issue they have nevertheless been called upon to construe the renewal provisions and in so doing they have referred to the order of succession with respect to the persons entitled to the renewal right. In *Silverman v. Sunrise*, 273 Fed. 909, 911 (CCA 2, 1921) the Court clearly stated: "The purpose of the statutory renewal provisions is to give to the persons enumerated in the order of their enumeration a new right or estate, not growing legally out of the original copyright property . . ." (emphasis added). It should be noted that the reference in the aforesaid quotation is to persons rather than classes, and to the order in which such persons are enumerated.

In *Fisher v. Witmark*, 318 U. S. 643, 646 (1943), this Court stated with respect to two authors who died before the first day of the twenty-eighth year of the copyright: "Ball and Olcott were no longer living at the time, and under Section 23 of the Act their interests in the renewal passed to their widows." It should be noted that Ball and Olcott both died leaving children.¹ The fact that this Court referred to renewal interests as passing to the widows of Ball and Olcott without considering whether any children of either author were living suggests an

¹New York Times: May 5, 1927, p. 27, col. 4; May 12, 1927, p. 27, col. 2; March 19, 1932, p. 15, col. 1; April 6, 1932, p. 10, col. 5.

acceptance by this Court of the principle that the widow has priority with respect to the renewal copyrights.

The *Hitmark* case is in accord with the opinion of the Assistant Attorney General referred to above which states (at pages 164-165):

"Each of these sections is specific in its terms and leaves but little or no room for construction. . . The very fact that each of these sections enumerates with such particularity the *persons* who may exercise the privilege of securing copyrights and having them renewed, *and the order in which the right vests*, shows that the persons enumerated are exclusive of all others, and that it was not the purpose of Congress to confer the right upon any person or persons not therein specifically mentioned" (emphasis added).

C. The following significant textbook authorities have been unanimous in construing Section 24 as giving the renewal copyright to the widow, and to the children only if she predeceases them:

(a) AMERICAN COPYRIGHT LAW (1917) by Arthur Weil (at p. 365). This was the first standard treatise on the Act of 1909 and is still generally regarded as authority of the first order.

(b) AN OUTLINE OF COPYRIGHT LAW (1925) by Richard C. DeWolf (at p. 66). Mr. DeWolf is a recognized copyright authority who at the time of the enactment of the 1909 statute was an attorney in the Copyright Office.

(c) MUSICAL COPYRIGHT (1932) by Alfred M. Shafter (at p. 136). This work is of particular interest since it is the only reference work devoted entirely to the subject of this litigation, musical compositions.

(d) A MANUAL OF COPYRIGHT PRACTICE (1945) by Margaret Nicholson (at pp. 195-197). This work is a standard guide in the publishing industry and consequently merits the attention of this Court in determining the prevailing practice among publishers with respect to renewals.

(e) RISKS AND RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PICTURES, ADVERTISING AND THE THEATRE (1952) by Samuel Spring (at p. 94). Mr. Spring is a distinguished copyright attorney whose experience with motion pictures dates back to the silent picture era.

Thus the available legal literature clearly indicates that the renewal copyright has been regarded as vesting in the

²Additional authorities in support of the above-stated position are CORPUS JURIS, COPYRIGHT AND LITERARY PROPERTY § 239 (Hale, 1917); AM. JURIS., LITERARY PROPERTY AND COPYRIGHT § 32 (1941); JACOBS, OUTLINE OF THEATRE LAW 27 (1949) and WARNER, RADIO AND TELEVISION RIGHTS 260 (1953). The remaining treatises published after the 1870 Act did not report the order in which the renewal devolves, other than, in a few cases, to repeat the statutory language. LAW, COPYRIGHT AND PATENT LAWS OF THE UNITED STATES, 1790-1870 (3d ed. 1870); MORGAN, LAW OF LITERATURE (1875); SPALDING, LAW OF COPYRIGHT (1878); DRONE ON COPYRIGHT (1879); BUMP, LAW OF PATENTS, TRADEMARKS, LABELS AND COPYRIGHTS (2d ed. 1884); MACGILLIVRAY, LAW OF COPYRIGHT (1902); BOWKER, COPYRIGHT—ITS HISTORY AND ITS LAW (1912); ELFRETH, PATENTS, COPYRIGHTS, AND TRADE MARKS (1913); FROHLICH AND SCHWARTZ, LAW OF MOTION PICTURES (1918); GRAHAM, PATENTS, TRADEMARKS AND COPYRIGHTS (2d ed. 1921); AMDUR, COPYRIGHT LAW AND PRACTICE (1936); MARCHETTI, LAW OF STAGE, SCREEN, AND RADIO (1936); WITTENBERG, PROTECTION AND MARKETING OF LITERARY PROPERTY (1937); LADAS, INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY (1938); SOCOLOW, THE LAW OF RADIO BROADCASTING (1939); SHAFTER, MUSICAL COPYRIGHT (2d ed. 1939); BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY (1944); COPINGER, LAW OF COPYRIGHT (8th ed. 1948); HOWELL, COPYRIGHT LAW (3d ed. 1952); ROTHENBERG, COPYRIGHT AND PUBLIC PERFORMANCE OF MUSIC (1954). Thus it is clear that the renewal succession language was deemed so plain and unambiguous as not to require any comment thereon.

widow during her lifetime and only if there is no widow living when the renewal copyrights accrue are the children entitled thereto.

D. A further indication that Congress intended the widow to take the renewal rights accruing during her lifetime to the exclusion of the children and that said right should go to the children only in the absence of a widow, is borne out by other Federal statutes dealing with death benefits to widows and children. Such statutes establish that it is usual for Congress to grant benefits to the widow in preference to the children and that such benefits go to the children only if there is no surviving widow. See The Congress, 2 U. S. C. 36a, 38a; Army, 10 U. S. C. 903; Pensions, Bonuses and Veterans' Relief, 38 U. S. C. 96, 191, 661, 691d, 739A(2); Public Lands, 43 U. S. C. 278; Pay and Allowances, 37 U. S. C. 362. Conversely when Congress did wish to have the children share the benefits with the widow, its intentions were manifested in clear and unambiguous language with the proportionate shares of the widow and children carefully specified. See Pay and Allowances, 37 U. S. C. 35(a)(2)(i) and (b)(i). Thus an examination of prior Congressional enactments indicates that Congress generally grants rights to surviving widows in preference to children; and that in those instances where it did not intend to grant widows such a preference the proportionate shares granted concurrently to the widow and children were not left to conjecture. Furthermore, if the children are to share in renewal copyrights with the widow, the children would not merely receive an equal share but would in fact receive preferential treatment. The preferential treatment arises because during the life of the widow the children would share the renewal copyrights with her, and after her death would be entitled, exclusively, to the renewal copyrights thereafter accruing.

E. The principle that the law granted the renewal copyright to the widow to the exclusion of the children, has been long and firmly accepted by authors, music publishers, motion picture producers and others. Such has been the custom and usage in the purchase and sale of copyrights.

Thus, *Tobani v. Fischer*, 263 App. Div. 503, 33 N. Y. S. 2d 294 (1942), and its companion cases of the same title, 36 USPQ 97 (S. D. N. Y., 1937); 98 F. 2d 57 (CCA 2, 1938) cert. den. December 6, 1938, demonstrate that at least as far back as 1928 the practice in the music publishing business was based upon the principle that the renewal copyright in the event of the author's death went first to the widow, and to the children only if the widow predeceased them. The distinguished publishing house of Carl Fischer, Inc. sought to obtain during the last few years of the original term of copyright "complete protection" of its rights with respect to the renewal period. To acquire such "complete protection" it secured an assignment from the living author and his then living wife and made no effort to secure any grant with respect to the renewal period from the then living children.

The opinion of the Appellate Division states at pages 504, 505:

"... the right to renew accrues upon application during the last year of the original term, and is limited to those enumerated in the act, including the author, and in the event of his death, the widow, despite any attempted assignment by the author during the original term of copyright . . .

"The contract was prepared by the attorney for Fischer, the Tobanis having had no advice of counsel. The draftsman addressed himself to the task of protecting Fischer . . .

"He envisioned the possibility of the death of Theodore prior to that of Helene. He knew that if Helene survived Theodore, she would be entitled to apply for renewals which thereafter accrued as to compositions, the original terms of copyright of which belonged to Theodore, under the provisions of the Copyright Act. Helene's survival was not improbable as, at the time of the making of the contract, Theodore was seventy-three years old and Helene was fifty-four. In the succeeding paragraph, therefore, Helene assigned to Fischer all renewals of copyright to the compositions to which otherwise she might be entitled pursuant to the pertinent provisions of the Copyright Act. The assignment was prefaced by the following language:

"The parties hereto mindful of the possibility that Mr. Tobani may not be living when the original term of copyright affecting some of the compositions hereinbefore described expires, and desiring to provide for *the complete protection of Fischer in the event of such contingency* * * * Helene also agreed to execute any further instructions from time to time that might be necessary to accomplish the intended purposes. In the paragraph following, Fischer, 'In consideration of the foregoing,' agreed to pay Theodore twenty-five dollars a week for life and, upon his death and within thirty days thereafter, 'to pay to Mrs. Tobani the sum of Five Thousand Dollars (\$5,000) in cash.'" (Emphasis added).

We do not cite the three *Tobani* cases for the proposition that as a matter of law the surviving widow has exclusive priority with respect to the renewal copyright over the children, but we do submit that these cases indicate that, as a matter of practice, such was relied upon as the law.

Further evidence, that in practice such was regarded to be the law by those dealing with copyright, is the brief for petitioner of Arthur Garfield Hays and John Schulman, attorneys for the Authors League of America and the Songwriters Protective Association, in *Fisher v. Witmark*, *supra*, at page 25. Likewise the brief (at p. 15) of R. W. Perkins for respondent music publishing house of Witmark in the same case, the petitioner's brief (at p. 19) for the Fox Film Corporation in *Fox v. Knowles*, 261 U. S. 326 (1923), and the brief (at p. 44) of the cross-appellee in *Harris v. Coca Cola*, 73 F. 2d 370 (CCA 5, 1934).

II.

THE WORD "CHILDREN" IN THE COPYRIGHT STATUTE DOES NOT INCLUDE ILLEGITIMATES.

A. It is unquestioned common law doctrine that "... terms of kindred when used in a statute include only those who are legitimate, unless a different intention is clearly manifested," *McCool v. Smith*, 66 U. S. 459, 470 (1861). While this canon of statutory construction has its roots in the common law,³ it is still acknowledged and relied upon.

³When the court below attempts to restrict the doctrine of "filius nullius" to matters of real estate, it ignores the fact that the doctrine was received into all areas of the common law with but few exceptions. For example, an illegitimate did not have the right to the name or title of his father, *Pfeiffer v. Wright*, 41 F. 2d 464 (CCA 10, 1930); he did not take the domicile of either of his parents, *Bow v. Nottingham*, 1 N. H. 260 (1818); 1 Bl. Comm., 459 (Cooley 4th ed. 1899); nor did he have a right to support from either parent, *Hard's Case*, 2 Salk 427 (1696), 91 Engl. Rep. 371; *State v. Ticman*, 32 Wash. 294, 73 P. 375 (1903); *Moncrief v. Ely*, 19 Wend. (N. Y.) 403 (1838). The exceptions were instances where this settled rule of law succumbed to the pressure of overriding public policy such as religion (illegitimates, with respect to marriages barred by consanguinity, were blood relations of their parents), and public order (illegitimates were included in a statute prohibiting unauthorized marriages of infants). See 2 Kent, Comm., 214 (13 ed., 1884).

As late as 1953 the Court of Appeals for the Fifth Circuit in the opinion of *Ellis v. Henderson*, 204 F. 2d 173, 174, stated: "The word 'child' employed in a document expected to have legal significance and especially in a statute to designate relationship with the father would, without more, ordinarily, refer to legitimate offspring". (emphasis added).

The question thus presented for decision is whether or not in the renewal section, now before the Court, there exists such overwhelming evidence of an intention by Congress to include illegitimates in the phrase "children" as to justify the rejection of the usual, well understood and so relied upon interpretation.

The answer is self-evident.

There is nothing in the Act, nor in its legislative history, nor in business practice,⁴ since its enactment, which indicates, even remotely, a Congressional purpose to use the word "children" other than in its generally understood and interpreted meaning.

B. In the section of the Copyright Act presented to the Court for construction, the word "children" stands alone and unqualified by explanation.

Under the Act, adult self-supporting children take equally with dependents. Dependency upon the deceased author is not made a criterion for qualification. Moreover,

⁴An indication that it was believed that illegitimates did not take under the Copyright Act can be garnered from the following article: Samuel J. Elder, *Duration of Copyright*, 14 YALE LAW JOURNAL 417, 418 (1905):

"It is often very burdensome for an assignee to ascertain in the names of what persons renewals should be taken out. This frequently occurs in the case of writers of music who have entirely disappeared from sight before the lapse of twenty-eight years, leaving no trace behind. It has been said of one music publisher in Boston that he must constitute himself a court of divorce and legitimacy, making world-wide inquiries."

the deceased author's "duty or non-duty to support" while alive is not relevant, since adult, self-supporting children take equally with minors.

Therefore, on the face of it, the statute contains no indication whatsoever that any extraordinary interpretation is to be given to the word "children". Moreover, tracing the legislative history of the renewal section, it is discovered that "children" were introduced as successors in interest to the renewal copyrights as early as the Act of 1831. All subsequent re-enactments and revisions of the renewal sections have repeated the same unqualified word "children".

While decisions may be found in which the same word has been held to have different meanings at different times, these decisions offer no guidance in the present case, where the same unqualified word has been neither added to, nor subtracted from, for one hundred twenty-five years.

In addition, respondent's contention, as presented in her brief below, gains no support from an examination of the practical interpretation placed upon this language since 1831. While one hundred twenty-five years have elapsed since the introduction of "children", as successors in interest to renewal rights, respondent cites neither decision nor text, nor even the existence of prior illegitimate claimants, to support her claim.

• • That these alleged rights have lain dormant over such an extended period of time, in and of itself, goes far toward proving that these alleged rights never existed.

• Thus respondent's case suffers from a complete lack of support.

On the other hand, there is overwhelming evidence that Congress has always understood and has always acted in reliance upon the rule of statutory construction contended

for by petitioner. On those occasions when Congress has so desired, it has specifically included illegitimates in its statutory definition of children.⁵ This practice certainly indicates that Congress has been aware of the statutory construction which courts give to the term "children".

C. It is submitted that the cases relied upon by the court below to support its conclusion that the reference to children in the renewal provisions includes illegitimate children do not in fact support this conclusion.

Before considering these cases, two footnotes written by the court below call for comment because they indicate where the court fell into error.

Footnote 4 reads: "It will be noted that there is no problem as to the identity of the illegitimate child in the instant case as it is agreed in 'Statement of Undisputed Facts' by the parties that the child Stephen is the illegitimate child of the author and has been publicly acknowledged by the father-author as such. * * *"

The court indicates that it has considered only the peculiar fact situation of this case, and has ignored the broad coverage of the Copyright Act. If it is decided definitively that all illegitimates come within the statutory language we may expect, with certainty, numerous actions brought by illegitimates who have *not* been publicly acknowledged. Since it is in the very nature of such relationships that they be secretive, positive identification will be difficult, and fraudulent claims may be encouraged.

Footnote 6 points out that "In our case the illegitimate son is a dependent of the father and mother".

⁵See *Navigation and Navigable Rivers*, 33 U.S.C. 902(14); *Pay and Allowances*, 37 U.S.C. 32(3), 424(1), 505(c), 667(b).

The idea that the Copyright Act has something in common with statutes which provide for "child or dependent relative" permeates the entire opinion of the court below. This idea is totally erroneous. Dependency is never a condition for the acquisition of an interest in a copyright.

Three of the cases cited by the court below are related: *Middleton v. Luckenbach S. S. Co.*, 70 F. 2d 326 (CCA 2, 1934); *Lateson v. U. S.*, 88 F. Supp. 706 (S. D. N. Y., 1950); and *Civil v. Waterman S. S. Corporation*, 217 F. 2d 94 (CCA 2, 1954).

The *Middleton* case construes the Federal Death on High Seas statute (46 U. S. C. 761) which provides death benefits for a "child or dependent relative". The case, at most, stands for the proposition that illegitimates come within the "terms of the act" (p. 330), that is, within either the classification child or dependent relative.

The court in the *Lateson* case does say in passing that the *Middleton* case stands for the proposition that "child" includes illegitimates. Clearly, this is a misreading of the *Middleton* case and was, in fact, unnecessary for the decision reached.

The *Civil* case construed the Jones Act provision (45 U. S. C. 59, incorporated by reference in 46 U. S. C. 688) granting death benefit rights to "children . . . and, if none, then of the next of kin dependent." The court, at page 98, says: "In view of the similarity in statutory language . . . the right of illegitimate children to qualify as beneficiaries extends to the Jones Act as well as to the Death on the High Seas Act. *Middleton v. Luckenbach S. S. Co.*, *supra*." (Emphasis added)

None of these cases stand for the proposition that the term "children" as used in these statutes includes illegitimates.

D. Many restrictions imposed upon illegitimates at common law have been removed by legislative enactments and by judicial decisions based squarely on such prior legislative enactments, or on contractual rather than statutory construction of the word "children". See, e.g., the cases cited by the court below: *In re Estate of Wardell*, 57 Cal. 484 (1881); *Turner v. Metropolitan Life Ins. Co.*, 56 Cal. App. 2d 862, 133 P. 2d 859 (1943). The court below concludes from such cases that illegitimates are *not* after one hundred twenty-five years, included within the term "children" as used in the copyright renewal provision.

It is submitted that this reasoning is not sound in construing the Copyright Act. The court is construing a statute which creates unique property and should hesitate to overthrow, retroactively as well as prospectively, an interpretation which has been universally relied upon, and whose rejection at this late date will affect countless transactions consummated over the years.

If there are any possible inadequacies in the present statute, Congress has the power to effect changes, along with the power to limit the scope thereof.

III.

THE DECISION BELOW WILL INJURE NOT ONLY THE MOTION PICTURE INDUSTRY BUT ALSO LIVING AUTHORS. CONSEQUENTLY, IT IS AGAINST THE PUBLIC POLICY OF THE COPYRIGHT LAW.

In addition to the guides for appropriate judicial construction outlined in Points I and II hereof, this Court should consider the injury which the decision below will inflict on motion picture producers and, concomitantly, on authors.

A. The motion picture producer must acquire rights which are exclusive and will endure for many years.

The motion picture industry is a prolific user of copyrighted material. Not only is the motion picture itself accorded protection under the Copyright Act, but all the creative component parts of the motion picture, i.e., the underlying literary, dramatic and musical works, out of which it is fashioned, are the subject of independent copyright protection. Large sums are spent each year for the acquisition of motion picture rights in such works. The ultimate cost of producing a motion picture represents, of course, a much larger investment. Consequently, the producer must have *exclusive* rights in the work he buys for film production. If the novel or play on which a picture is based can be performed by a competing medium, such as television, the potential gross of the film version will be seriously affected.

As a result of unpleasant experiences motion picture producers can no longer risk the large investment involved in the purchase of motion picture rights in a literary work and the production of a motion picture based thereon if they can be subject to competitive television broadcasts of the work. It is also an economic necessity for the motion picture producer to acquire the motion picture rights, not only exclusively, but also for a sufficiently long period, in order to recoup the substantial investment which the production of a motion picture requires, as well as to insure the maximum return on the investment. Distribution, including reissues, will sometimes continue for many years (as witness the case of "Gone With The Wind"), and it

will often require additional years to utilize the "remake" values of motion pictures.⁶

B. Practice in the motion picture industry as to clearing rights for the renewal term.

Now, it is not unusual for a motion picture producer to acquire the motion picture rights in a work at a time when it is in the final (e.g., the last seven) years of its original term of copyright. In such situations it has been necessary for motion picture producers to insure themselves of a continuation of exclusive rights by acquiring rights with respect to the renewal copyright not only from the author, but also from the wife of the author.

Motion picture producers have relied upon the generally accepted view that a grant with respect to the renewal copyright secured from the living author and his living wife, gave the producer *exclusive* rights with respect to the renewal period if the wife secured such renewal as the author's widow, where the author died prior to the time when such renewal could be secured. It has never been assumed that any surviving children had any interest in the renewal so secured by the widow. In certain instances

⁶The Court of Appeals for the Ninth Circuit in *Columbia Pictures Corporation v. National Broadcasting Company, Inc.*, 107 U. S. P. Q. 344 (S. D. Cal., 1955), in dealing with an analogous situation, that is, the need for preserving the exclusivity of the motion picture producer's right, said, "A studio with no assurance it could protect an investment in a copyrighted work from infringement by unlimited use through burlesque of the work, would tend to pay less and less for an author's work. Unlimited and unrestrained taking by burlesque could destroy the Copyright Act, undermine the motion picture industry, the legitimate stage, and reduce the actor to his status of 300 years ago, dependent on the largess of the Prince or Patron."

motion picture producers have sought a grant of rights from an author's children in addition to the author's wife. Such instances, however, are exceptional and producers have sought such a grant solely to insure themselves of a continuation of the exclusive grant of rights should both the author and the wife die before the accrual of the renewal copyright term. As a practical matter, in the overwhelming number of instances, a grant from the author and his wife has generally been regarded as sufficient protection even though there were children in existence (cf. *Tobani v. Fischer, supra*).

Speaking for the motion picture industry, we can assure this Court without qualification that motion picture producers have never, without a single known exception, secured a grant with respect to the renewal copyright from an author's illegitimate children.

C. The decision below injures the marketability of literary works.

Since the decision of the learned lower Court, and pending a reversal of that decision by this Court, the situation has completely changed. On the basis of the decision below, if a motion picture producer accepted a grant of rights from a widow and less than all of the children of the author, any child not joining in the grant would, presumably, be free to deal with such work in any manner he deemed desirable. Accordingly, such a child would be in a position to convey a similar grant of rights to a competing medium.

Consequently, the motion picture producer, who, for example, during the last few years of the first term of copyright, wishes to buy exclusive rights for the renewal period, must secure clearances from the following:

- i. The living author.
- ii. The author's living wife.
- iii. The author's living children—whether minor or adult and whether legitimate or illegitimate.

Now, in many instances it will not be feasible to deal even with the legitimate children involved. Although there are procedures available under the state laws for the purchase of a minor's contingent future interest, such procedures are often cumbersome and time-consuming. In addition, with respect to foreign works protected by our copyright laws there may not be any procedures available in some of the foreign countries, where such rights would have to be acquired for the purchase of this type of **contingent future interest from minors**. Thus, should this Court hold that the renewal rights are the property not only of the widow, but also of all the children of the author, the marketability of many literary properties in their renewal term, and, especially, during the final years of their original copyright term, would be seriously affected, if not entirely vitiated.

Prior to the decision of the court below no inquiry was ever made by a motion picture producer in the situations here discussed, as to whether the author had illegitimate children. Since the decision below such inquiry has become an unavoidable, unpleasant necessity.

A striking instance of the injury done to *living* authors by the decision of the Court below is the case of a famous produced play. This play was written by Americans and was based on a foreign play by a foreign author. The first term of copyright of the foreign play still has six years to run. The American authors of the play and the author

of the underlying foreign play agreed to sell the motion picture rights to a major motion picture producer for a sum in excess of \$500,000. Because of the decision of the Court below the producer, for the first time in its history, made private inquiries as to whether any of the authors had any illegitimate children. These inquiries revealed that the foreign author of the underlying play had a number of legitimate children and twice that number of *alleged* illegitimate children and possibly others unknown. Because of this situation the producer concluded that even if a grant with respect to the renewal period were secured from the author's present wife, from his legitimate children and from his more numerous alleged illegitimate children, the title to the rights with respect to the renewal period would still be under a cloud because of the possible existence of other illegitimate children, now unascertainable. This difficulty precluded the consummation of this transaction to the detriment of the authors in an amount of over \$500,000, and to the likely detriment of the producer in a greater amount.

Conceivably the authors of the above mentioned play were able or will be able to sell the rights to another producer who may be willing to take the risks involved because of the existence of alleged illegitimate children. That is not the issue.

The above instance is given only as an illustration of the serious situations which as a result of the decision below, confront not only the motion picture producer but also the author who wishes to sell his creation for motion picture use. The marketability of literary properties is plainly affected. The loss to the motion picture producer who cannot use the properties is substantial. It is obvious, however, that an even greater loss—in impact if not in actual dollars and cents—will be suffered by the author who is unable to

sell his property to the motion picture producer because of the necessity of securing grants from children, i.e., minor, adult, and afterborn children as well as illegitimate children, real or alleged.

Furthermore, time is frequently, if not generally, of the essence in motion picture production, i.e., the "market" for the motion picture rights in most literary works varies with changing times and tastes. The necessity of awaiting the appointment of guardians, the procedures for securing court approval, the uncertainty of foreign legal procedures, and the like, will often discourage or negate altogether the purchase of such property from minor children.

Should this Court hold that illegitimate children are included within the definition of children contained in the statute, the situation would be even more chaotic. The motion picture producer would be required to deal with renewal copyrights at his peril since there is absolutely no procedure available for determining with certainty whether there are illegitimate children of an author. Even if the illegitimate child is acknowledged, this does not alleviate the situation since even where acknowledgment is provided for, it may, as a general rule, be merely a signed paper which need not be made public (see, e.g., § 255, Calif. Probate Code, enacted 1931; amended by Stats. 1943, ch. 998, p. 2912). The recognition of illegitimates within the statutory term, children, suggests further complications. In purchasing motion picture rights from next of kin, will it become necessary to deal with illegitimate brothers, sisters, cousins, nephews, nieces, etc.?

Furthermore, if the executor should renew the copyright in his own name because of the absence of a widow and children, or if the next of kin should renew in the absence of a widow, children and executor, and it should happen

that after either such renewal a person appeared who could establish that he was the illegitimate child of the author; then such prior renewal would be totally void and the work would fall into the public domain completely, *Tobani v. Fischer*, 98 F. 2d 57 (C. C. A. 2, 1938). Furthermore, it is hardly necessary to point out that the mere assertion of a claim by an alleged illegitimate in such a case would cast a serious cloud upon any grant of rights theretofore made with respect to the renewal copyright by such renewing executor or next of kin.

The ramifications are endless.

D. The renewal section should be construed on the basis of what is best for the living, active, creative author. This is in accord with the underlying policy of the copyright law, in general, and the renewal section, in particular.

Shall the renewal section be construed for the benefit of the living author even if to do so may be contrary to the interests of some of his statutory successors? Or shall the section be construed for the benefit of some of the statutory successors of the dead author even if to do so will result, in actual practice, in injury to the living author?

We submit that the foregoing questions are pertinent in construing Section 24. The results of the decision below, as above indicated, leave no room for doubt that the living author will suffer a very real injury if, in order to convey effective rights with respect to the renewal copyright of his work, he must secure additional grants not only from his wife but also from his children, legitimate and illegitimate.

If this Court should find that a doubt is present, and that "widow or children" might conceivably be read as "widow

and children", then, on the basis of the well settled policy of the copyright law, that reading should be chosen which is most beneficial to the living author.

Copyright begins with public policy and ends with public policy. The first expression of this policy is to be found in Section 8 of the Constitution which empowered Congress to enact copyright legislation, "to promote the progress of science and useful arts".

The last expression of this policy is to be found in the decision of this Court in *Mazer v. Stein*, 347 U. S. 201 (1954) where Mr. Justice Reed, speaking for the Court said at page 219:

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'. Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."
(Emphasis added).

That the policy above expressed should be adopted, particularly in the construction of the renewal section, was made plain by this Court in *Fisher v. Witmark*, 318 U. S. 643 (1943). In that case Mr. Justice Frankfurter speaking for the Court indicated at page 654 that the object of the renewal section of the Copyright Act is to preserve the renewal term to the author "despite sale of the Copyright" and said: "That this is the basic consideration of policy underlying the renewal provision of the Copyright Act of 1909 clearly appears from the report of the House committee which submitted the legislation . . ." In that report of the House Committee it was stated (*Witmark* at p. 654):

"Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period." (Emphasis added).

Mr. Justice Frankfurter further stated at page 657: "If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need. Nobody would pay an author for something he cannot sell".

We submit, therefore, in the light of the House Committee Report above referred to, and the decisions and *ratio decidendi* of this Court in *Fisher v. Witmark* and *Mazer v. Stein, supra*, that it is the underlying policy of the copyright law to create an "advantage" primarily for the living, active, creative author and only secondarily for his contingent successors named in the renewal section.⁷

Any restrictions imposed upon the author's freedom to deal with the renewal copyright, other than those specifically set forth in section 24, should not be of such a nature that they will be detrimental to the living, creative author. Such, however, is the result of the decision of the Court below.

E. The decision below will cast a cloud on the exclusivity of the rights heretofore purchased, and will subject widows to accounting actions.

Finally, we submit, this Court should not overlook the fact that the decision below, if permitted to stand, will raise innumerable questions as to the exclusivity of the rights

⁷It is to be particularly noted that the House Committee Report, as quoted in the *Witmark* case, is primarily and expressly concerned with the living author and his problems, and only incidentally with the problems of the persons who might acquire the renewal because of the author's death.

heretofore paid for and relied upon by purchasers, and as to the duty of widows to account to children for a share of the proceeds received by them for the sale of such exclusive rights.

CONCLUSION

For the reasons stated it is respectfully submitted that this Court should reverse the opinion and judgment of the court below, and find that an author's widow is alone entitled to the renewals of copyrights accruing during her lifetime and that an illegitimate does not come with the term "children" of Section 24 of the Copyright Act, 17 U. S. C. 24.

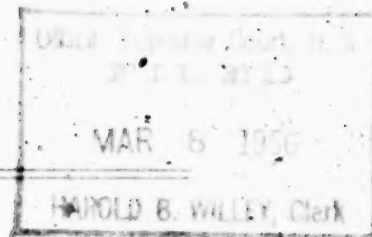
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 529

MARIE DE SYLVA,

Petitioner,

—against—

**MARIE BALLENTINE, as Guardian of the Estate of
Stephen William Ballentine,**

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

**BRIEF OF AMICUS CURIAE
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS**

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posers, Authors and Publishers*

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**BRIEF OF AMICUS CURIAE
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AUTHORS AND PUBLISHERS**

Opinions Below

The opinion of the District Court (R. 29-32) is unreported. The opinions of the Court of Appeals (R. 47-71) are reported in 226 F. 2d 623.

Jurisdiction

Jurisdiction was invoked under the Federal Declaratory Judgment Act, 28 U. S. C. § 2201, and 28 U. S. C. § 1338 (a), the action relating to ownership of renewal rights under the Federal Copyright Act, 17 U. S. C. § 24. The District Court awarded summary judgment to defendant (petitioner herein) on April 29, 1953 (R. 34). The Judgment of the Ninth Circuit Court of Appeals revers-

ing the District Court was entered August 25, 1955 (R. 62). Certiorari was granted January 9, 1956. At the same time the Court granted the American Society of Composers, Authors and Publishers (hereinafter called the "Society") leave to file a brief as *Amicus Curiae* (R. 73).

For an analysis of cases involving declaratory judgment as applied to questions involving ownership of renewal rights, see *Carmichael v. Mills Music Inc.*, 121 F. Supp. 43 (S. D. N. Y. 1954).

Statutes Involved

The pertinent provisions of the Copyright Act of 1909, as amended (17 U. S. C. § 24), is:

"§ 24. DURATION; RENEWAL AND EXTENSION.—The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: Provided, That * * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children, be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright * * *."

The previous Statutes relating to renewal rights are printed in the Appendix.

Question Presented

This brief will not discuss the question of illegitimacy. It will be limited solely to the question presented upon the Society's motion for leave to file a brief as an *Amicus*, namely:

Upon the death of an author leaving a widow and children is the widow alone entitled to renewal rights in those works which may be renewed after her husband's death and during her lifetime? (It is unquestioned that the widow has no interest in renewal rights in those works which may be renewed after her death, and that the children are solely entitled to such renewals if they be then living).

Statement of the Case

Petitioner's late husband, George G. De Sylva, a writer of musical works, died in 1950. Many of his works were first copyrighted during the last 28 years of his life, as a result of which several have been renewed by petitioner, his widow, and others will come up for renewal in the future (R. 4, 5, 12).

Respondent, Marie Ballentine, as Guardian of the Estate of her minor child, Stephen William Ballentine (a son of Mr. De Sylva born out of wedlock), brought an action for a declaratory judgment on August 8, 1952, seeking a declaration that the child was entitled to share renewal rights in De Sylva's copyrights equally with petitioner (R. 3-7). In petitioner's answer she claimed as sole owner of the renewals as the widow of De Sylva, and challenged the infant's claim to be a child of the deceased (R. 12-13).

Both parties moved for summary judgment (R. 14, 24, 25). The District Court denied respondent's (plaintiff's) motion and granted that of petitioner, holding that so long as petitioner is alive she, as the widow of George G. De Sylva, is the sole owner of renewals of copyrights in which George G. De Sylva had an interest (R. 33, 34).

The Court of Appeals for the Ninth Circuit reversed the District Court holding that the renewal of the copyright of a deceased author "is for the benefit of the surviving spouse and children together" (R. 56). Judge Fee dissented on the ground that the courts should not grant declaratory relief in a case such as this until after a prior determination has been made by the Register of Copyrights and further that "it was an abuse of discretion for the trial court to attempt to give declaratory relief in a field so beset with questions going to the primary right as this. 28 U. S. C. §§ 2201, 2202" (R. 67-71).

Argument

Petitioner's brief adequately covers the point that the history of Section 24 of the Copyright Act (17 U. S. C.) and its clear language indicate that the interpretation placed upon the statute by the District Court, should not have been upset on appeal.

This brief will attempt to avoid unnecessary discussion of that phase of the case; it will stress the practices in the profession of writing and the business of publishing which support petitioner's interpretation. It is submitted that if the Court should be in doubt about the interpretation of the statute, then—and only then—the case should be remanded to the District Court to receive evidence of the interpretation placed upon the statute by authors and their grantees since 1870 when the law was first enacted in substantially its present form,—or at least since 1909,

the date of the last general revision of the Copyright Act. *Kennedy v. Silas Mason Co.*, 334 U. S. 249, 256 (1948); *Sterens v. Howard D. Johnson Co.*, 181 F. 2d 390, 394 (4th Cir. 1950).

As the motion of the Society for leave to file a brief as an *Amicus* points out, the custom and practices of parties dealing with these properties shows that they have at all times believed that the widow is solely entitled to those renewals which come into being during her lifetime (after her husband's death) and that the children are solely entitled to the renewals which come into being after her death.

POINT I

During Mr. De Sylva's lifetime it was the belief of composers, authors and publishers that renewal rights first accruing after a writer's death vested solely in his widow, and that such rights first accruing after her death vested in his children. Presumably his estate was planned with this in mind.

George G. De Sylva, a member of the Society from 1920 to the time of his death, served on its Board of Directors from 1922 to 1930. McNamara, *ASCAP Biographical Dictionary of Composers, Authors and Publishers* (2d ed. 1952) 119.

Upon Mr. De Sylva's death, the Society named petitioner as his successor, and has been paying to her the royalties which would have been payable to her husband had he been living. She in turn, has granted to the Society the right to license performing rights in the musical compositions of her deceased husband (Motion, par. 7, p. 2).

This designation was pursuant to the Society's customary practice in cases where a writer member dies

leaving a widow and children; that is, it regards the widow as the person entitled to renewal rights in those works which may be renewed after her husband's death and during her lifetime (Motion, par. 8, pp. 2-3).

This is the view of all 24 members of the Society's Board of Directors, and has been the consistent opinion of its counsel (Motion, par. 10, p. 3).

Mr. De^a Sylva, as a member of the Society's Board of Directors from 1922 to 1930 was presumably familiar with this interpretation of the law and drafted his will in relation to it.

POINT II

The authorities whose experience embraced the enactment of the 1909 Law support petitioner's interpretation of the Act.

In examining the views of textwriters who interpreted the law before Mr. De Sylva's death—cited in petitioner's brief—it should be noted that two of them, Richard C. De Wolf and William B. Hale (author of the article on Copyright in *Corpus Juris*) were actively engaged in the copyright field when the 1909 Act was passed.

De Wolf spent practically his entire professional life in the Copyright Office, ultimately becoming Acting Register of Copyrights. He was there at the time of the 1909 Act.

Mr. Hale, author of the treatise on Copyrights in *Corpus Juris* was a distinguished authority on copyright and Associate Editor-in-Chief of *Corpus Juris*. As attorney for the American Law Book Company, he was active in the preparation of the 1909 Act, and actually testified regarding the renewal provision of the Bills leading to Act of 1909 (Hearings Before Joint Comm. on Patents of Senate and House on Pending Bills to Amend and

Consolidate the Acts Respecting Copyright, Mar. 27, 1908, pp. 76-7). An examination of the 300 pages devoted to this subject in *Corpus Juris* makes it quite apparent that the copyright bar is justified in regarding this article as one of the leading works on the subject. This is an unusual compliment for a contribution to a law encyclopedia.

Margaret Nicholson's work has become almost a bible—certainly a universal desk-aid—to the entire publishing industry.

These authors know their subject, and have apparently taken the pains to find out what the business practices are. Incidentally, they were all written before Mr. De Sylva's death. The statements of writers relied on by respondent are of recent origin—having been formulated after Mr. De Sylva's death. They have not been endorsed by the leaders of the copyright bar or by the writing and publishing fraternity, whose interests are primarily involved.

POINT III

In awarding to the widow of a deceased author the renewal rights arising during her lifetime, and to his children the renewal rights which arise after the widow's death, Congress adopted a logical pattern.

Respondent urges that the widow and children should be treated as members of a single class, because to do otherwise would favor the widow as against the children. The respondent assumes that the decision of the District Court excluded children from any interest in renewal rights. That was not the result of the District Court decision. On the contrary, the children alone—and to the exclusion of the estate of the widow—are entitled to the exclusive rights in renewals arising after the widow's death. If they were both members of one class, it would seem that the class would close upon the author's death.

and that the widow would therefore have a vested interest in renewals arising after her death, which would cut down the exclusive enjoyment of such renewals by the children.

If the widow and children are members of the same class—and there should be a number of children, possibly by a prior marriage, and possibly all adults—an impecunious widow might find herself in a position of enjoying only a very small fraction of an interest in renewal rights, and having no ability to market them unless the children were willing to join in a conveyance. With several children involved, and with the possibility of friction developing between children and widow, the marketability of the widow's rights would be greatly impaired—a result which no author having a normal family life would welcome.

These results might have followed from the language of the statute as it existed before 1870. The act of 1831 provided that the renewal rights of a deceased author passed to the "widow *and* child, or children." Act of February 3, 1831, 4 Stat. L. 436. When the act of 1870 was passed, this was changed to "widow *or* children". R. S. § 4954. The disjunctive form was continued in the act of 1909. In the words of Judge Shiras, "It is a fundamental rule of construction that * * * when a previous statute is amended by an alteration of the terms used therein, it is to be assumed that it was the intent to alter the meaning of the previous act in that particular. * * * The natural presumption is that the phraseology of the statute was changed in order to change its meaning" *U. S. v. Bashaw*, 50 Fed. 749, 753-4 (8th Cir. 1892), *rev'd on other grounds*, 152 U. S. 436 (1894). See also *U. S. v. Woodruff*, 175 Fed. 776; 777 (2d Cir. 1909).

As petitioner's brief points out, the law was then and has since been well settled that the mention of a person (in this case the widow or widower) "*or* his children" results in the construction that the children have a gift only by substitution in the event of the death of the named person prior to the event which makes the gift effective—

in the case of wills, upon the death of the testator, and in the case of copyright renewals, upon the expiration of the initial term. *Bender v. Bender*, 226 Pa. 607, 75 Atl. 859 (1910); *Matter of Lane*, 79 Misc. 71 (N. Y. 1913); *Penley v. Penley*, 12 Beav. 547, 50 Eng. Rep. 1170 (1850); *Tate v. Amos*, 197 N. C. 159, 147 S. E. 809 (1929); *Schaeffer's Adm'r v. Schaeffer's Adm'r*, 54 W. Va. 681, 46 S. E. 150 (1903); *Carlin v. Helm*, 331 Ill. 213, 162 N. E. 873 (1928); *Rolf's & Lesing's Guardian v. Frischholz's Exr.*, 251 Ky. 450, 65 S. W. 2d 473 (1933); *Mead v. Close*, 115 Conn. 443, 161 Atl. 799 (1932).

This interpretation as applied to copyright renewals provides for the widow during her lifetime and for the children after her death. As in the case of dower rights and laws safeguarding the widow's right of election, it must be recognized that the widow has a claim on a portion of the estate of her husband which is prior to that of the children. Laws relating to other forms of property are less considerate of children than is Section 24 of the Copyright Act as interpreted by the District Court; for an owner of such other forms of property may disinherit his children absolutely, whereas it is conceded that an author may not do so if both he and his wife fail to survive the twenty-seventh year of the initial term.

Conclusion

The judgment of the Court of Appeals should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

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March 6, 1956

APPENDICES

Provisions relating to renewal in Copyright Acts of 1790, 1831 and 1870

APPENDIX I

Section 1, Act of May 31, 1790, 1 Stat. L. 124-126:

"And if, at the expiration of the said term, the author or authors, or any of them, be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors, administrators or assigns, for the further term of fourteen years * * *"

APPENDIX II

Section 2, the Act of February 3, 1831, 4 Stat. L. 436:

"SEC. 2. *And be it further enacted*, That if, at the expiration of the aforesaid term of years, such author, inventor, designer, engraver, or any of them, where the work had been originally composed and made by more than one person, be still living, and a citizen or citizens of the United States, or resident therein, or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author, designer, or engraver, or, if dead, then to such widow and child, or children, for the further term of fourteen years * * *"

APPENDIX III

Revised Statutes, July 8, 1870, Section 4954:

"SEC. 4954. The author, inventor, or designer, if ~~he~~ be still living and a citizen of the United States or resident therein, or his widow or children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years, upon recording the title of the work or description of the article so secured a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term. * * *

IN THE
Supreme Court of the United States

October Term 1955

No. 529

MARIE DE SYLVA,

Petitioner,

against

MARIE BALLENTINE as Guardian of the Estate of
Stephen William Ballentine,

Respondent.

**BRIEF ON BEHALF OF SONGWRITERS
PROTECTIVE ASSOCIATION AS
AMICUS CURIAE.**

SCHULMAN, KLEIN & STERN

*Attorneys for Songwriters Protective
Association, as Amicus Curiae*

JOHN SCHULMAN

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**BRIEF ON BEHALF OF SONGWRITERS
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AMICUS CURIAE**

This brief *amicus curiae* is submitted pursuant to permission granted by the Court on January 9, 1956.

**The Interest of Songwriters Protective
Association**

Songwriters Protective Association has no property or financial interest in the controversy between the parties. It is a voluntary association of authors and composers of music. Its members and their families will be affected generally by the construction given in this case to the renewal provisions of the Copyright Act (17 U. S. C., Section 24).

The Construction of the Statute Proposed Herein

It is submitted that:

- a. Section 24 of the Copyright Act should be construed as granting to an author's widow a priority in status over his children;
- b. The term children should include only those who are legitimate.

The Scope of this Brief

Since the facts of the controversy will be developed by the respective parties to the action, the Court will not be burdened herein by any restatement of the facts as they appear in the record. This brief will seek to present various elements which should be considered in the construction of the statutory provision.

POINT I

Section 24 of the Copyright Act should be construed as granting to an author's widow a priority in status over his children.

The question before the Court is one of first impression.

The renewal provisions of the Copyright Act have been considered by this Court on two occasions. In *Fox Film Corporation v. Knowles et al.* (1923), 261 U. S. 326, the decision was that an executor named in the will of an author who had died leaving no widow or children, could properly apply for the renewal, although the author's death had occurred prior to the time when the renewal

right matured. The renewal was recognized to be a new grant, not merely an extension or prolongation of the original term, and consequently the executor named in the author's will took precedence over the next of kin.

Fred Fisher Music Company, Inc. v. M. Witmark & Sons (1943), 318 U. S. 643, concerned the rights of a living author who had survived beyond the expiration of the first term of copyright. The question in that case was whether an agreement made by the author to renew the copyright and to assign the renewal to a publisher was enforceable. The ruling of this Court was that Congress had not established a policy of preventing an author from contracting to convey his renewal if he survived until it matured. The opinion did not disturb the doctrine that the agreement would be binding only upon the author, and such an agreement would not impair the rights of the statutory grantees who would take in his place if the author failed to survive.

The instant case refines the problem to a determination of the status of the author's widow and children vis-a-vis each other, and the answer depends upon the construction of the following portion of Section 24:

"the author of such work, if still living; or the widow, widower, or children of the author, if the author be not living, * * * shall be entitled to renewal and extension in the copyright in such work for a further term of 28 years."

The narrow issue herein presented has not heretofore been decided by this or any other Court.

In ruling that the widow and children constitute a single class, the reasoning of the Court of Appeals seems to have been as follows (R. pp. 50-52):

1. The children of the author are as much objects of the author's natural bounty as the widow;

2. There is no qualifying phrase between "widow . . . or children of the author" to separate one from the other as enumerated classes;

3. An earlier draft of the Copyright Act had had such a qualifying phrase;

4. If the widow and children are not to be considered as constituting one class but as separate classes, neither would have an absolute priority, but a race to file an application would ensue, with the prize going to the swiftest; and

5. The mere physical position of the word "widow" as preceding the word "children" does not indicate an intent to create a priority.

In developing its opinion upon this pattern, the Court of Appeals, we submit, erred in failing to attach adequate significance to the construction of the sentence, and to the utilization of the word "or".

It would seem only logical that if Congress had intended to create a single class, it would have utilized the word "and" to define the combined status of the widow and the children. Only in that event would there have been no significance in the juxtaposition of the words "widow" and "children".

Nor, we submit, was the Court correct in considering the disjunctive to apply only to the act of filing an application for renewal (R. 56). That interpretation would seem to disregard the physical construction of the statutory provision

which speaks in terms of the persons "entitled" to the renewal. It is only after the enumeration of the persons entitled to the renewal that the statutory provision refers to the making of an application.

The reasoning that Congress intended to treat an author's widow and children on a parity because they are equally the object of his bounty, fails to take into account traditional distinctions made by the law in economic protection for widows and for children. The entire philosophy and public policy upon which the widow's dower right was predicated, expressed a special solicitude for widows. Systems of community property, prevalent in a number of our States, obviously give to the wife a status different from that accorded to children. Decedent estate laws, such as that of New York (Decedent Estate Law, § 18), which inhibit the disinheritance of a wife, although not of children, make a similar distinction. Consequently a statutory grant of an economic benefit to a widow prior in status to that of children is in accord with tradition.

A study of the literature on copyright indicates that many writers do not deal with the question of the relative status between the widow and children, but only refer to the doctrine that the new grant is created for the benefit of the persons "enumerated" in the statute "in the order" of their enumeration.

However, some writers have been more specific. It is significant that two of the outstanding authors on copyright, both of whom lived through the birth of the 1909 Copyright statute, expressed the view categorically that the surviving spouse—widow or widower—held a separate status in priority to that of the children. Richard C.

DeWolf, Esq., whose lectures on copyright were published in 1925 (AN OUTLINE OF COPYRIGHT LAW), says (pp. 65-66):

"The renewal can only be obtained by the beneficiaries expressly named in the law, and by them in the order named, i.e., the person having the first right is the author, if living at the end of the original term; if he is not living, then the widow or widower, is entitled to renew; if there is no widow or widower, the children come in; in their absence, the executor of the author's will; and finally in the absence of all other beneficiaries and the intestacy of the author, the author's next of kin are entitled to the renewal."

Mr. DeWolf was not a casual commentator nor is his book the work of a person lacking expertness in this branch of law. He had been associated with the Copyright Office for many years. The introduction to his work was written by Thorvald Solberg, Esq., then Register of Copyrights (pp. xix-xxiv), and the preface indicates (p. vi) that much of the manuscript had been read by Mr. Herbert A. Howell, one of his colleagues in the Copyright Office.

Although Mr. Howell's own book THE COPYRIGHT LAW fails to clarify the instant question, he gives an indication of the view that the surviving spouse takes precedence over the children, in a contribution to a compilation of International Copyright Law. In the H. L. Pinner's compilation 2 WORLD COPYRIGHT (1954), Mr. Howell's statement reads as follows (p. 352):

"The death of an author affects only such copyrights or common law rights as he had not already absolutely disposed of to another. But whether or not he had so disposed of his copyrights, the right

of *renewal* would devolve upon the surviving spouse, children, executor or next of kin of the author in the order named, by virtue of Section 24 of the Copyright Act (Fox Film Co. v. Knowles, 261 U. S. Rep. 326 1923)."

Arthur W. Weil, Esq., in his well known work *AMERICAN COPYRIGHT LAW*, published in 1917, makes the following statement (p. 365):

"Except in the cases which have been specified, where the proprietor is entitled to a renewal copyright, the persons hereinafter named are entitled to a renewal or extension, if living, in the order named: the author, his widow or her widower, the author's children, or executors, or next of kin, if there be no will."

As Mr. Weil paraphrased the statute and punctuated his sentence, there can be no doubt of either the existence of a priority, or its order.

In recent years some text writers have suggested a different interpretation.

Samuel W. Tannenbaum, Esq., in a lecture reprinted in *7 COPYRIGHT PROBLEMS ANALYZED* (CCH 1952, p. 12) expressed the opinion that the widow and children should be considered to be members of a class. It was this writer's contention that an injustice would be done in holding that the children of an author who had been married several times would be excluded from an interest in the renewal by a widow who was not their mother.

Writing in the *Columbia Law Review*, Theodore R. Kupferman, Esq. (44 Col. Law Rev. 712) says (p. 717, note 28):

"It is submitted that the spouse does not take precedence but the spouse and children hold together as tenants in common."

No reason is given for this submission nor is the question analyzed by the writer.

On the other hand, Samuel Spring, Esq., in *RISKS AND RIGHTS IN PUBLISHING TELEVISION RADIO ADVERTISING AND THE THEATRE* (1952), says in a footnote (4a. p. 310):

"As to whether, in the case of a deceased author leaving a widow and children, the Benefits of the right of renewal are solely in the widow, without any right of sharing by the children, there are no decisions. The language of Sec. 24, C. S., fairly construed, indicates that only the widow has the right of renewal, even if there be a surviving widow and children, of a deceased author. Renewal by the widow alone is the established practice as to renewals in such circumstances. As to whether or not the children nevertheless have a right to require the widow to hold part of the property in trust for them, there are no decisions. It would seem that the Federal language of Sec. 24 confers the benefits of renewal on the widow alone, even if there be surviving children, and the state laws of inheritance whereunder children usually share with the widow, in the case of an intestate spouse, cannot prevail over the Federal statute. Here again we have an example of the unfortunate obscurities in the Copyright Statute."

A significant text may be one which is not a lawbook at all. A *MANUAL OF COPYRIGHT PRACTICE*, by Margaret Nicholson was published in 1943. The author states in her preface (p. vii) that the book is not for copyright lawyers.

or students, but one for the author, editor, agent—in short, the layman.

It is not an unfair assumption that an individual writing for this practical purpose, after consulting with the various persons mentioned in the preface and acknowledgments, would express a viewpoint generally accepted in business circles.

Miss Nicholson undertook in Part III of her book to clarify copyright practices by means of questions and answers (pp. 167-198). Concerning renewals, the following question and answer appears (p. 197):

(p. 197)

"The law says if an author is dead, the renewal must be obtained by his wife, or his heirs, or the executor named in his will. If the wife also dies, should the renewal be obtained by her executor or the executor in the author's will (presuming they are different executors, of course)?

The answer given is:

"The Copyright Act stipulates that if an author is dead the renewal may be made by

- I. His widow. If there is no widow, by
- II. His child. If there are no children, by
- III. The author's executor. If he died intestate, by
- IV. The author's next of kin.

Legally adopted children may qualify as II. Under IV, actual blood relatives are qualified—not a sister-in-law, uncle by marriage, et cetera.

From this it follows that the wife's executor could not in the circumstances be qualified to make the renewal.

Although mere antiquity of statement is no guarantee of wisdom, and though an interpretation of a statute by a layman may ordinarily have little validity, it is submitted that the construction given to the statute by Messrs. De Wolf and Weil and Miss Nicholson is entitled to great weight in the present circumstances. It is our belief that this construction of the statute has been widely acted upon by authors, publishers and by other users of copyrighted material.

The affirmance of the decision arrived at in the Court of Appeals would lead to much confusion and a chaotic condition.

If children of deceased authors are co-owners with widows, they are entitled to an accounting of the monies received by the widows from the utilization of the renewal copyrights. The doctrine of *Carter v. Bailey*, 64 Maine 458, referred to by Judge Fee in his dissenting opinion, has not been followed in cases such as *Shapiro-Bernstein & Co., Inc. v. Jerry Vogel Music Co., Inc.*, 73 F. Supp. 165, and *Jerry Vogel Music Co., Inc. v. Miller Music, Inc.*, 272 App. Div. 571, aff'd 299 N. Y. 782.

The present decision may therefore lead to a flood of litigation. Widows who have dealt with renewal copyrights, and the collaborators of authors and users of copyrighted material who have dealt with widows face the possibility of numerous claims for accounting by children. The atmosphere would be further complicated by the cir-

circumstance that obligations have been created, tax payments have been made and other liabilities have been incurred in various transactions which might now have to be reviewed.

In addition, there will be many questions relating to the grants of licenses and of the exclusivity of grants already made. If widows and children constitute a single class, an important element of copyright, namely, its exclusivity would be impaired.

In many instances the children who have survived authors are infants. This raises additional problems—problems both with respect to accountings, distribution of their avails of utilization of renewal copyrights, and the making of agreements in respect of copyrighted works. Transactions which have heretofore been considered valid when entered into by the widows of authors may require the application to probate courts for approval.

We respectfully submit that in the absence of a clear demonstration that the statute requires the widow and children to be treated in one class, and as co-owners of the renewal copyright, a construction to that effect should be avoided. If the widow has no priority the economic value of the renewal copyright to her will be diminished. In place of the widow's security, she may have only a small share of the proceeds derived from the renewal copyright.

POINT II

The term children should include only those who are legitimate.

We leave to the respective parties the argument of the question whether under California law the infant party enjoys the right of a legitimate child of the deceased author. May we urge, however, that there is no indication that Congress, in employing the term "children" in the year 1909, departed from the conventional view that only legitimate children were intended.

Respectfully submitted,

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No. 529

In the Supreme Court of the United States

OCTOBER TERM, 1955

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v.

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OF STEPHEN WILLIAM BALLENTINE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE REGISTER OF COPYRIGHTS AS
AMICUS CURIAE

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MEMORANDUM FOR THE REGISTER OF COPYRIGHTS AS
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THE ISSUES INVOLVED

Pursuant to 17 U. S. C. 24¹ a copyright endures for a term of twenty-eight years; it may be renewed for a second term of equal duration. The statute provides that the following persons are entitled to such renewal:

* * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or chil-

¹ Title 17 of the United States Code was enacted into positive law by Section 1 of the Act of July 30, 1947, 61 Stat. 652.

dren, be not living, then the author's executors, or in the absence of a will, his next of kin * * *.

In the instant case the author died before most of his compositions became eligible for renewal. He was survived by his widow and by an illegitimate child. The question presented is whether the renewal right vests exclusively in the surviving spouse or whether the widow and children constitute a class who share the copyright as cotenants.

INTEREST OF THE REGISTER OF COPYRIGHTS

Copyright for the second or renewal term of twenty-eight years is secured under Section 24 only when:

* * * application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright * * * in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication. * * *

Only those within the classes specifically enumerated in Section 24 are eligible and the application must be filed in the Copyright Office within the statutory time limits.

At the outset of this proceeding both parties asked the Copyright Office to state its practice

on the particular point at issue.² The Principal Legal Advisor of the Copyright Office wrote parallel letters to the parties.³ Certain statements have also been made as to the functions of the Copyright Office in this area.⁴ The dissenting opinion of the court below raises questions as to the necessity of certain administrative action by the Copyright Office before adjudication.

It is believed that this memorandum may be helpful in clarifying these problems.

DISCUSSION

Respondent and the court below read the statute as providing for four classes of persons successively entitled to the renewal of the copyright—i. e., the author, the widow, widower, or children; the executor; and the next of kin—and that there are no preferential rights among the members of the same class. Petitioner, on the other hand, urges that the courts may not disregard the use by Congress of the disjunctive “or”, especially since in testamentary and similar transfers *mortis causa* the term “or” has an established substitutional meaning. Hence, she takes the position that the statutory text constitutes a succinct and technically correct way of

² Petitioner also asked the Office to state its position on the question of whether an illegitimate child was a child within the meaning of 17 U. S. C. 24. The Register takes no position on this issue.

³ See App. A, *infra*, pp. 20–24, for the longer letter.

⁴ See, e. g., Motion of ASCAP for Leave to File a Brief Amicus Curiae, p. 4.

expressing a congressional purpose which, if spelled out, would read more clumsily:

to the author of such work, if still living, or to the widow or widower of the author, if the author be not living, or if such author, widow or widower be not living, to the children of such author.

Legislatures, including Congress, however, have been notoriously so lax in the use of the words "and" and "or" that the mere selection of either term by itself cannot serve as any safe indication of the legislative purpose. *United States v. Fisk*, 3 Wall. 445, 447; *United Starch & Refining Co. v. National Labor Relations Board*, 186 F. 2d 1008, 1014 (C. A. 7); Sutherland, *Statutes and Statutory Construction* (3d Ed.), Vol. 2, Section 4923.

In order to assist the Court in ascertaining the meaning of the clause "widow, widower, or children" we shall set forth the historical development of the pertinent portions of the renewal clause of 17 U. S. C. 24 and of the regulations and official instructions under the various statutes.⁵

1. *The Act of 1790.*

The first federal copyright statute, the Act of May 31, 1790, 1 Stat. 124 provided⁶ for a copy-

⁵ For the development of the renewal provisions of the copyright statute, in general, see *Fisher Co. v. Witmark & Sons*, 318 U. S. 643, interpreting 17 U. S. C. (1940 Ed.) 23. 17 U. S. C. (1940 Ed.) 23 is identical with 17 U. S. C. (1952 Ed.) 24.

⁶ Section 1, 1 Stat. 124.

right term of 14 years with a right of renewal for another term of 14 years if the author was living at the expiration of the first term. However, if the author did not survive the first term of fourteen years, the copyright was terminated regardless of the needs of his family (7 Debates in Congress, Appendix cxix).

2. *The Act of 1831.*

The Act of February 3, 1831, 4 Stat. 436, brought about two important changes. It enlarged the first term from fourteen to twenty-eight years; it also provided that if the author did not survive the original term the renewal interest would not fall into the public domain but would pass to the author's surviving widow and children (cf. *Fisher Co. v. Witmark & Sons*, 318 U. S. 643, 650-651).

Section 2 of the 1831 Act (4 Stat. 436) provided in the part here pertinent:

* * * if, at the expiration of the aforesaid term of [twenty-eight] years such author * * * be still living * * * or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author * * * or, if dead, then to such widow and child, or children for the further term of fourteen years * * *. [Emphasis added.]

Petitioner takes the position (Pet. Br. 13) that under Section 2 of the 1831 Act the widow clearly

shared the renewal right. Section 16 of the 1831 Act dealing with the renewal of copyrights granted under the 1790 statute is less explicit; it gives the renewal right to the author's "widow, child or children".

3. *The Act of 1870; the Revised Statutes, and the Amendments of 1891.*

Under the Act of July 8, 1870, Section 88, 16 Stat. 212, the renewal right was given: "to the author * * * if he be still living * * * or his widow or children, if he be dead * * *." In the absence of committee reports and of pertinent debate on the specific problem, we cannot say whether or not the substitution of the "or" for the "and" contained in the 1831 Act was intentional or merely an example of the almost proverbial looseness in the use of "and" and "or". But see the statements in respondent's brief at pp. 16-17.⁸

We shall show, however, in the following part of this memorandum that the renewal provisions of the subsequent amendment to, and reenactments of, the copyright statute⁹ retained the clause "widow, [widower] or children," and that

⁸ Petitioner's argument is based on the difference between the clause "widow and child, or children" used in the 1831 statute and "widow [widower] or children" used in the subsequent legislation.

⁹ See also, *infra*, the various statements to the effect that subsequent legislation practically reenacted the 1831 statute.

¹⁰ R. S. 4954, the Amendments of 1891, the Copyright Act of 1909, and the codification of 1947.

the judicial and administrative interpretation of the copyright acts since 1870 has been that they were not intended to interfere with the rights granted by the 1831 statute, but merely to extend them and to prevent the lapse of the right into the public domain by providing for new contingent classes of beneficiaries.

The first published Directions for Securing Copyrights of which we are aware were issued in 1874. To the extent that they are here of interest they provide:

6. Each copyright secures the exclusive right of publishing the book or article copyrighted for the term of twenty-eight years. At the end of that time, the author or designer, or his widow or children, may secure a renewal for the further term of fourteen years, making forty-two years in all.¹⁰

In 1878, Section 88 of the 1870 statute became, without change, Section 4954 of the Revised Statutes. The Act of March 3, 1891, Section 2, 26 Stat. 1107, amended R. S. 4954 by eliminating the restriction of copyrights and the renewal thereof.

¹⁰The Directions issued in 1883, 1891, 1893 and 1895 use the following similar language:

"6. The original term of [a] copyright runs for twenty-eight years. *Within six months before* the end of that time, the author or designer, or his widow or children, may secure a renewal for the further term of fourteen years, making forty-two years in all." [Emphasis in the original.]

The article "a" in brackets is found only in the Directions of 1895.

8.
to residents and citizens of the United States. It did not modify the "widow or children" clause.

Beginning March 1, 1899, the Directions for Registration of Copyright (Copyright Office Bulletin No. 2) provided with respect to the renewal of copyrights:¹¹

Within six months before the expiration of the first term of the copyright,¹² the author, if he is still living, or his widow or children, if he is dead, can have the copyright continued for a further term of fourteen years. [Emphasis in the original.]

Thus, in contrast to the regulations which had been in effect from 1874 to 1899, Copyright Office Bulletin No. 2 provided expressly that while he was alive the author alone could apply for the renewal, but that after his death application could be made by the widow or children.

The Report on Copyright Legislation by the Register of Copyrights, Mr. Thorvald Solberg, dated December 1, 1903, took the position (at p. 12) that "The stipulation of the act of 1831 [on the exercise of the right of renewal by the author, or his survivors] was substantially followed by the act of 1870, the Revised Statutes, and the act of March 3, 1891."

¹¹ Subsequent editions of Copyright Office Bulletin No. 2 were published in July 1899, May 1900, July 1901, 1904, 1905 and 1906.

¹² The 1905 and 1906 editions of Copyright Office Bulletin No. 2 inserted at this place the clause "the copyright statutes provide (Revised Statutes, section 4954) that."

4. *The Copyright Acts of 1909 and 1947.*

During the involved genesis of the Copyright Act of March 4, 1909, the early bills provided for a single copyright term for the life of the author and for fifty years thereafter (*Fisher Co. v. Witmark & Sons*, 318 U. S. 643, 652). With respect to the renewal of copyrights issued under the Revised Statutes some of these bills provided:¹³

That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the renewal term provided for under existing law, be further renewed and extended by the author, if he be still living, or if he be dead, leaving a widow, by his widow, or in her default or if no widow survive him, by his children, if any survive him. * * *

The pertinent legislative history does not reveal whether the draftsmen of this section intended to restate what they considered to be the existing law, or whether they desired to correct what they considered to be a defect in it.

As finally enacted, the Copyright Act of 1909 abandoned the one long term of the early drafts and retained—although in a liberalized form¹⁴—

¹³ S. 6350 and H. R. 19,853, 59th Cong., 1st Sess., Section 19 (Copyright Office Bulletin No. 12, p. 36-37); S. 8190, 59th Cong., 2d Sess., Section 18 (S. Rept. 6187, 59th Cong., 2d Sess., p. 19).

¹⁴ The duration of the renewal term was extended from fourteen to twenty-eight years. Moreover, the renewal right was no longer limited to the widow or children. It was

the renewal term device of the earlier legislation. The pertinent provision of the 1909 Act (35 Stat. 1080) reads as follows:¹⁵

* * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children, be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term * * *. [Emphasis added.]

The Act thus retained the formulation used in the 1870 Act which had been construed administratively as permitting the exercise of the renewal right by the widow or children. It did not adopt the language of the earlier draft bills which would have eliminated the uncertainties caused by the use of the ambivalent term "or".

The Committee Reports refer to the renewal provisions as follows:¹⁶

* * *. Your committee do not favor and the bill does not provide for any extension

extended to the widower, and in the absence of a surviving widow, widower, or children to the author's executor or next of kin depending on whether or not he left a will.

¹⁵ Section 23, dealing with a copyright secured under the 1909 Act, and Section 24, referring to copyrights subsisting at the time the 1909 Act went into effect. Section 23 of the 1909 Act is now 17 U. S. C. 24; Section 24 of the 1909 Act was omitted as obsolete in 1947, cf. S. Rept. 663, 80th Cong., 1st Sess., pp. 19-20.

¹⁶ H. Rept. 2222, 60th Cong., 2d Sess., pp. 14-15, and S. Rept. 1108, 60th Cong., 2d Sess., pp. 14-15. S. Rept. 1108 adopts H. Rept. 2222, see S. Rept. 1108, p. 1.

of the original term of twenty-eight years, but it does provide for an extension of the renewal term from fourteen years to twenty-eight years; and it makes some change in existing law as to those who may apply for the renewal. Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or, in the absence of a will, his next of kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal * * *

Section 24 deals with the extension of copyrights subsisting when this act goes into effect and has the same provision regarding those who may apply for the extension of the subsisting term to the full term, including renewal, as is found in the preceding section regarding renewals generally.

In 1947, Congress enacted Title 17 of the United States Code into positive law; 17 U. S. C. 24 (*supra*, pp. 1-2) incorporated the language of the renewal provision of the 1909 Act without change. A bill introduced into the first session of the 83rd Congress by Congressman Walter, designed

to give the surviving spouse priority over the children, died in committee.¹⁷

The Regulations relating to the renewal of copyrights issued by the Copyright Office under the 1909 Act provided from 1910 until their repeal in 1948:¹⁸

Application for the renewal or extension of a subsisting copyright may be filed within one year prior to the expiration of the existing term by:¹⁹

(1) The author of the work if still living;

¹⁷ H. R. 2584, 99 Cong. Rec. 802. In 1950, a subcommittee of the Copyright Committee of the American Bar Association reported that:

"The question of whether the surviving spouse takes precedence over the children has never been settled. The more literal and equitable construction would seem to favor their being regarded as members of the same class * * *."

The full Copyright Committee commented that: "clarification of the renewal provisions in section 24 would be desirable and that the problem is an extremely difficult one. It * * * favors a number of its suggestions, but is forced to conclude that the matters presented are too difficult and too controversial to enable it to reach a conclusion in the short time at its disposal."

Report of Copyright Committee, Section of Patent, Trade-Mark and Copyright Law, American Bar Association, 23 (1950).

¹⁸ Copyright Office Bulletin No. 15 (1910), Section 46; Copyright Office Bulletin No. 15 (1912 to 1938), Section 48, 37 C. F. R. (1938) 201.24. These were repealed in 13 F. R. 8648.

The Regulations issued under the 1947 Act, 37 C. F. R. (1949 Ed.); Parts 201 and 202, are far less detailed than the earlier ones and do not refer at all to copyright renewals.

¹⁹ There are slight but inconsequential variations in the formulation of this initial paragraph.

(2) The widow, widower, or children of the author if the author is not living;

(3) The author's executor, if such author, widow, widower, or children be not living;

(4) If the author, widow, widower, and children are all dead, and the author left no will, then the next of kin.

(5) * * *

The general instructions issued by the Copyright Office in its circular No. 15, "INSTRUCTIONS FOR SECURING REGISTRATION OF CLAIMS TO RENEWAL COPYRIGHT" in 1949, 1950, and 1953 continue the phraseology of the old regulations, and place the "widow, widower, or children," on the second step.²¹

Thus, insofar as registration of a claim to copyright is concerned, the recent circulars and the old regulations, like Copyright Office Bulletin No. 2, *supra*, p. 8, do not make the filing of a

²⁰ 37 C. F. R. (1938) 20124, also contained a subparagraph (5) referring to the renewal of the copyrights in posthumous or composite works, and a paragraph (b) specifying the renewal fee.

²¹ Circular No. 15, in use in 1949, provided in the part here pertinent:

"2. The widow, widower or children of the author, if the author is not living; * * *"

Circular No. 15, issued in 1950 and 1953, provides in the part here pertinent:

"b. If the author is not living, his widow (or widower) or children may claim renewal."

See App., *infra*, pp. 24-26; for the full text of the 1953 circular which is still in use.

renewal application by the child of a deceased author contingent upon the death of the author's widow or widower.²²

Aside from the decision below, there are no direct judicial holdings to the effect that after the death of the author the surviving spouse and children share the renewal right. A number of opinions, however, contain general statements to the effect that, as far as the widow and children are concerned, the renewal provisions of the 1909 Act are virtually identical to those of the 1831 statute under which the right of renewal vested in the widow and children,²³ and that the subsequent legislation merely liberalized the benefits provided by the earlier Acts. *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247, 252 (C. A. 1);²⁴ *Danks v. Gordon*, 272 Fed. 821, 825 (C. A. 2); *M. Witmark & Sons v. Fred Fisher Music Co.*,

²² It may be assumed that, in reenacting the Copyright Act in 1947, Congress recognized and confirmed the legitimacy of these regulations, instructions and circulars. Cf. *Allen v. Grand Central Aircraft Co.*, 347 U. S. 535, 545; *Shapiro v. United States*, 335 U. S. 1, 16.

The administrative interpretations of the Copyright Act by the Register of Copyrights are entitled to the same weight as the interpretations by other agencies of the legislation administered by them. *Mazer v. Stein*, 347 U. S. 201, 211-213.

²³ See *supra*, pp. 5-6.

²⁴ It [H. Rept. 2222, 60th Cong., 2d Sess.] explained positively sections 23 and 24 which are in issue here, and which, as we have shown, practically re-enact what had preceded them, beginning with the Act of 1831."

38 F. Supp. 72, 76 (S. D. N. Y).²⁵ affirmed, 125 F. 2d 949 (C. A. 2), affirmed, 318 U. S. 643.²⁶ The opinion of this Court in *Fisher v. Witmark & Sons*, 318 U. S. 643, seems to rest on similar considerations. It also appears from the opinion in *Danks v. Gordon*, 272 Fed. 821, 825-826 (C. A. 2), that in 1912 a renewal copyright was taken out by the widow and children of the deceased author.²⁷

In contrast, there are several general statements, again not directly involving the situation here in issue, to the effect that the renewal right belongs to the author, his widow, widower or children, executor, or next of kin in order of their enumeration.²⁸ *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909, 911 (C. A. 2), certiorari

²⁵ “—while the statute of 1831 is practically similar to the present statute on this point [the assignability of the author’s renewal right.]”

²⁶ In *Harris v. Coca-Cola Co.*, 73 F. 2d 370, 371 (C. A. 5) the court stated “Later acts used the same expression, but added as beneficiaries the widow and children if the author be dead.” (Emphasis added.)

²⁷ The records of the Copyright Office show many joint renewal applications filed by widow and children, and others in which the widow and children have filed separate applications for the same work. Because of the large number of renewal applications filed annually—19,519 during fiscal 1955 alone—it would require long research to determine which applications referred to the same work. Such a study would not reveal whether, when an application is received from widow or child alone, others in the class are still living.

²⁸ A respondent points out, these statements may be construed as considering the “widow, widower or children” as a single group.

denied, 262 U. S. 758; see also 28 Ops. Atty. Gen. 162, 165.

5. *Remarks on the Practice of the Copyright Office.* In the absence of a clear statutory provision or controlling decision, the Copyright Office might be said to have had three alternatives:

(1) The Office might have taken the position that it had no right to question any renewal claim, no matter how doubtful on its face. This would not only be unworkable in practice, but in direct conflict with the statute and the case law.²⁹

(2) The Office might have taken the position that, under what is now Section 24, the widow took precedence over the children.

(3) The Office might have believed that Section 24 probably intended to treat widows and children as a single class for renewal purposes.

The second alternative would probably have resulted in refusal to register claims filed by the children while the widow was still alive; to take that position would have required a belief that there was no doubt that that was the meaning of Section 24 and would have foreclosed the issue. The third alternative permits the Office to register claims filed by either the widow or children, severally or jointly. Since the Copyright Office follows a general policy of resolving any substantial doubt in favor of registration, it

²⁹ Cf. *Mazer v. Stein*, 347 U. S. 201; *Rouse v. Twentieth Century-Fox Film Corp.*, 122 F. 2d 51; 53 (C. A. D. C.); *Brown Instrument Co. v. Warner*, 161 F. 2d 910, 911 (C. A. D. C.) 28 Ops. A. G. 162, 170.

could have granted registration in the name of the widow or children despite any belief on its part that the second or third alternative might be the better interpretation of Section 24. As we have pointed out, in the accepting of renewal applications the regulations of the Copyright Office have consistently placed both the widow and children within the second step, treating them as coming within one group for the purposes of registration.

A statement in "An Outline of Copyright Law" by Richard C. DeWolf, published in 1925, who later became Acting Register of Copyrights, has been cited to the contrary.³⁰ When he became Acting Register in 1944, Mr. DeWolf stated that, "My own view is that they (the widow and children) are members of one class; consequently, any member of the class may file application for

³⁰ At p. 66; cf. p. 277. Mr. DeWolf joined the Copyright Office in 1907, became a member of the bar in 1913, left the Office in 1918, and returned in 1923. See also Mr. DeWolf's comments on this point to the Practising Law Institute: " * * * It seems not to have been definitely settled whether the widow takes precedence over the children, or whether widow and children together form a single class, all standing on the second step, so to speak. Punctuation would suggest the latter interpretation * * * " *Two Lectures on Copyright*, October 5 and 13, 1944, MS in Copyright Office Library, p. 26.

Nicholson, *A Manual of Copyright Practice* (2d Ed., 1956) 162 reads: "If there are both widow and children, renewal may be made by one on behalf of all * * * " (Cf. the quotation from the first edition in Petitioner's Brief, at p. 11. The Second edition was published after the filing of petitioner's brief).

renewal and thereby obtain a legal title * * *³¹

The dissenting opinion in the court below raises a question as to whether the respondent has exhausted his administrative remedies, and appears to assume that the Copyright Office might have refused to register an application by the respondent. As the foregoing explanation makes clear, the Copyright Office would not have refused to register such applications. As a matter of fact, the Copyright Office has registered renewal claims in the name of Stephen William Ballentine.³²

This memorandum does not urge that there can be no question as to the correct legal interpretation of Section 24. Nor does it go so far as to contend, as Mr. Samuel W. Tannenbaum asserted to the copyright bar in 1951, that treatment of a widow and children as a single class is the "only proper view."³³ Our purpose is to repeat what Mr. DeWolf said in 1944 that the Copyright Office "has never felt that the matter was clear enough to justify taking the position that a child

³¹ For the full text of this letter, see App., *infra*, pp. 26-28.

For the doctrine that any member of a class may file a renewal application, holding the legal title in trust for the other members of the class, see *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909 (C. A. 2); *Tobani v. Carl Fischer, Inc.*, 98 F. 2d 57, 59 (C. A. 2), certiorari denied, 305 U. S. 650.

³² R-100799 (Oct. 10, 1952); R-139424 (Nov. 22, 1954); R-140294 (Dec. 9, 1954), and R-140926 (Dec. 27, 1954).

³³ Tannenbaum, *Practical Problems in Copyright*, in *Copyright Problems Analyzed*, 7, 12 (CCH 1952).

could not renew so long as the widow was living,³⁴

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

GEO. S. LEONARD,
Acting Assistant Attorney General.

PAUL A. SWEENEY,
HERMAN MARCUSE,
Attorneys.

ABRAHAM L. KAMINSTEIN,
*Chief, Examining Section,
Copyright Office.*

APRIL 1956.

³⁴ See App., *infra*, p. 27.

APPENDIX

SEPTEMBER 5, 1952.

McCORMICK, NORRIS & HORGAN,

210 West Seventh Street,

Los Angeles 14, California.

Attention: Mr. Patrick D. Horgan.

GENTLEMEN: We must apologize for our delay in replying to your letter of August 21, 1952, in which you made general inquiries about two renewal problems—whether an author's widow takes a renewal in preference to his children, and whether an author's illegitimate child is to be regarded as one of his "children" for renewal purposes. In fairness, we feel we should mention that we have also received a letter from Mr. Leon E. Kent of Fink, Leventhal and Kent, making the same inquiry concerning the right of a child to claim jointly with a widow, and our answers to both of you will be virtually identical in this respect.

Before directly discussing your question, we believe that we should first explain that the Copyright Office is not a discretionary or quasi-judicial agency. We do not test the basic validity of copyright claims, but merely register them as long as they comply with the formal requirements of the law, either on their face or under the undisputed facts at our disposal. On the other hand, in performance of this more or less ministerial duty, we are sometimes required to construe the copyright law, in order to make

sure that an applicant falls within one of the classes of persons who are entitled to assert a claim. Thus, based upon legal research and analysis, we have established certain working principles as to the meaning of some undefined terms in the law. In setting up these principles, we have been guided by the rule that any substantial doubt should be resolved in favor of the applicant. For this reason, our decisions should not be regarded as definitive or official; they have been made, for the most part, in the absence of any judicial or higher administrative authority.

It has always been the position of the Copyright Office, as expressed in our information circulars and correspondence, that a deceased author's widow and children are to be regarded as a single class for renewal purposes, and that the widow takes no precedence over the children in asserting renewal claims. While the instructions appearing on page 2 (a) of Form R may not make this clear, the fact that the widow and the children are treated as separate, in stating the language to be used for asserting renewal claims, should not be interpreted as an implication that the one is to be preferred over the other. Our Circular 15 treats them as a single renewal category.

We express this position in daily practice by accepting the renewal claims of an author's widow, and those of his children, on the same application. It is perhaps significant in this connection, to note that if we regard two claims as basically conflicting, we will register them, but not on the same application. Likewise, we raise no question concerning joint widow-

children claims and register them without correspondence. This differs from cases where a claim is asserted contradicting one which has already been registered, since we make a practice of requesting an explanation in such instances, before proceeding with entry of the inconsistent claim.

This is not to say that we regard our position as the only possible one, or that we rule out the possibility that a court may adopt the opposite position. However, we do feel that, in the absence of any direct authority, our present position is more probably correct. Likewise, it accords with our rule of registering claims in doubtful cases since, if we adopted the opposite conclusion, we would be forced to reject outright the entry of certain claims.

There is no direct authority on this point, although the commentators seem to be in general agreement that the widow and children are to be regarded as a single class, and are to hold the benefits of the renewal as tenants in common. Concededly, the language of the statute is not without ambiguity, although perhaps the more persuasive construction would seem to treat the claimants as one group. On the other hand, at least one aspect of the legislative history of the provision appears to support our position. The present language of the Section was substituted for that used in an earlier draft of the statute, which read: " * * * that the copyright * * * may be further renewed and extended by his widow, or in her default or if no widow survive him, by his children." The fact that this specific provision was dropped in favor of the present language

could imply an intention to group the widow and children together.

Your question as to whether an illegitimate child is entitled to claim renewal as one of the "children" of the author represents a problem which, we believe, is far more uncertain and difficult than the one we have just discussed. Our position on the question cannot be regarded as settled, since we have seldom, if ever, been called upon to deal with this situation directly. On the other hand, we can at least discuss the problem hypothetically, in relation to certain working principles we have established.

First of all, it is quite probable that we have registered some renewal claims in the names of the illegitimate children of authors, without having any notice of that fact. This is because the basis of claim would be listed on the renewal form simply as "the child of the deceased author," and we would have no reason to look behind the claim. On the other hand, even if we were notified that the child was illegitimate, we feel that the claim should probably still be registered.

It could be argued that, since the meaning of the word "children" is undefined in the statute, its definition must be sought under the general common-law rule of statutory construction, there being no federal common law. The general rule is evidently that, where no clear intention otherwise is displayed, illegitimate children are not to be considered "children." On the other hand, the applicability of this rule apparently varies from situation to situation and from jurisdiction to jurisdiction, and the reasons behind it may con-

flict with the congressional policy reflected in the renewal section. In view of the doubt surrounding this question, we are inclined to think that the Copyright Office might be exceeding its function if it refused registration in the name of an illegitimate child. Whether the claim would be held valid if tested in court is, to our mind, something of an open question.

We are enclosing duplicate copies of our Form R and circular 15 for your possible use.

Sincerely yours,

(S) GEORGE D. CARY,
Principal Legal Advisor.

Enclosures: 2 Forms R, 2 Circulars 15.

COPYRIGHT OFFICE

THE LIBRARY OF CONGRESS

WASHINGTON 25, D. C.

No. 15

Instructions for securing registration of claims to renewal copyright.

The Copyright Law (Title 17, U. S. Code, §§ 24, 25) provides that the original term of copyright is for twenty-eight years. In the case of a work which was originally copyrighted in unpublished form, this term begins on the date on which registration was made in the Copyright Office. The copyright term for published works begins on the date of first publication.

The law also provides that the original copyright may be renewed for an additional twenty-eight years. Application for renewal copyright

should be filed on Form R, which is supplied by the Copyright Office upon request. Each application for renewal should be accompanied by the statutory fee of \$2.00, but it is not necessary to send copies of the copyrighted work.

The copyright law prescribes that application for registration of renewal copyright must be made during the last year of the original twenty-eight year term, measured from the exact date on which the original copyright began. In other words, the application and fee should not be submitted until after the end of the twenty-seventh year of the first term, and they must be received in the Copyright Office before the end of the twenty-eighth year. If no application and fee are received, or if they are received after the original term has expired, the work falls into the public domain, and the copyright cannot then be revived.

The following persons are entitled to claim a renewal copyright:

1. Aside from the groups of works mentioned in paragraph 2, below, renewal copyrights in all works (including works by individual authors which appeared in periodicals or in cyclopaedic or other composite works), may be claimed by the following groups of persons:

- a. The author of the work, if he is still living at the time when renewal is sought.

- b. If the author is not living, his widow (or widower) or children may claim renewal.

- c. If neither the author, his widow (or widower), nor any of his children are living, and the author left a will, the author's executor may claim renewal.

d. If the author died without leaving a will, and neither his widow (or widower), nor any of his children are living, his next of kin may claim renewal.

2. The proprietor of the copyright may claim renewal only in the case of certain groups of works, enumerated below. The term "proprietor" may be defined as the person owning the copyright at the time when application for renewal is made. The works which only the proprietor may renew are as follows:

a. Posthumous works, i. e., works published and copyrighted after the death of the author.

b. Periodicals and cyclopaedic or other composite works.

c. A work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author).

d. A work in which the original copyright was secured by the employer, for whom the work was made for hire.

Circular No. 15

APRIL 22, 1944.

LIGON JOHNSON, Esq.,

1619 Broadway, New York 19, N. Y.

DEAR MR. JOHNSON: I have your interesting letter of April 19.

The question of whether the widow takes precedence over the children in renewal copyrights has never been settled. My own view is that they are members of one class; consequently, any member of the class may file application for renewal and

thereby obtain a legal title, holding the renewal copyright in trust however for the other members of the class. It would seem to me that if it had been the intention to give the widow a right of renewal to the exclusion of the children the language of the section would have read that copyright could be renewed by the widow if the author is not living or, if neither author nor widow is living, then by the children, etc. The tenor of the discussions in regard to the renewal provisions, as you may recall, seems to emphasize the desirability of the author's being able to provide for his family. Let us suppose that an author has been married two or more times and that children survive him by an earlier marriage. Then do you think the law would intend the widow, i. e., the person who was his wife at the time of his death, to take the entire renewal copyright to the exclusion of the children?

The difficulty in giving a valid title to the renewal copyright under the terms of the existing law is obvious, and has frequently been brought to our attention. However, it would be almost as great if the question were one of a number of children as it is with the widow included along with the children. So, also, of the next of kin or indeed of several joint authors. I fear the difficulty is one inherent in the renewal provisions of the statute, and that if the Office were to take the position that the children could not share in the renewal rights so long as the widow remained alive, there would be just as much dissatisfaction as under the opposite view. At any rate, the Office has never felt that the matter was clear

enough to justify taking the position that a child could not renew so long as the widow was living. Our policy, as you know, is to register the renewal in the name of any beneficiary who seems reasonably entitled and leave the apportionment of interests among various beneficiaries to be settled by them or by a court if need should arise.

With best regards,

Sincerely yours,

RICHARD C. DEWOLF,
Acting Register of Copyrights.